Chancery Bar Association

31 July 2009

The Rt. Hon Lord Justice Jackson.

Dear Judge,

Review of Civil Litigation Costs

On behalf of the Chancery Bar Association (ChBA) I am pleased to present the response of the Association to your Preliminary Report.

The ChBA has become increasingly concerned about the escalation of costs in Civil Litigation, and therefore welcomes your Preliminary Report and the opportunity which it has afforded to us to become engaged in a review of those costs.

The breadth of the work undertaken in the Chancery Division, the experience and expertise of those on the ChBA working group, and the responses the group has received from practitioners have assured us that, indeed, "one size does not, and cannot be made, to fit all".

The working group, under the most able guidance of Martin Farber and Julia Beer, have engaged constructively and positively with the issues raised in your Preliminary Report. Where appropriate they have proffered recommendations as to how those issues may be addressed.

The ChBA, and the working group in particular, would welcome the opportunity of engaging further with you in your review, should you consider that to be of assistance.

Yours,

Michael Todd QC
Chairman, Chancery Bar Association

Chancery Bar Association

REVIEW OF
CIVIL LITIGATION COSTS

RESPONSE OF THE CHANCERY BAR ASSOCIATION
TO THE PRELIMINARY REPORT OF
THE RIGHT HONOURABLE LORD JUSTICE JACKSON

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Chancery Bar Association

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.

The Chancery Bar Association operates through a committee of some 17 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users' Committee and various Bar Council committees.

Introduction

1. We share the concerns about the perennial problem of the costs of litigation. We believe that the fundamental objective of any legal system is to deliver the best possible system of justice in the most efficient manner and at an acceptable cost to court users.

2. The existing system already restricts recoverable costs to those which are reasonable and (on the standard basis of assessment) proportionate. It may be that these restrictions need to be applied more robustly. It may be that the assessment procedure needs developing and/or the costs judges need greater assistance from trial judges to enable more robust assessments to take place. If properly applied, an issues-based approach to costs orders in appropriate cases, clear cost-relevant comments from trial judges coupled with the tests of reasonableness and proportionality, should deal with most of the concerns about costs without the need for further rules or fundamental change.

3. One problem caused by introducing further rules is that they encourage a "tick-box" mentality, instead of encouraging judges and costs judges to use the flexibility and discretion inherent in the existing general principles.

4. Another is that, insofar as they impose further restrictions on recoverable costs, they will necessarily result in the disallowance of costs which are reasonable and proportionate.

5. We feel that no meaningful comparison can be drawn between the needs and demands (and hence costs) of the legal system in England and Wales, on the one hand, and those of foreign jurisdictions such as Germany, New Zealand and Scotland and what works in those jurisdictions will not necessarily work in this jurisdiction. However, this does not mean that lessons cannot be learned from examining other jurisdictions. Plainly, concerns about costs are not confined to England and Wales. Equally plainly, other jurisdictions have sought to tackle the problem by adopting a fixed recoverable cost regime. Our view is that such an approach would not benefit chancery litigation court users in this jurisdiction because factors such as the variety of complex work comprising chancery litigation, the number of large and very large cases (in terms of money and/or legal importance), the substantial amount of important cases in chancery

litigation which do not have a money value, the demands made upon the legal system by the volume of work and the diversity of client needs, make a "one size fits all" or even a "four sizes fits all" fixed costs regime unfair to successful court users.

6. Further, it seems to us that the introduction of a fixed costs regime will impose an increased and unfair costs burden on successful litigants. There is no reason why a claimant who is wronged or a defendant who is wrongly sued should be out of pocket (the costs system must be analysed in terms of the effect on "ordinary litigants" and not only in the context of large insurer defendants). Further, a system that has a starting point of a preconceived notion of what proportion of actual costs it is reasonable to recover (two-thirds is the target in New Zealand but, it appears to us that in practice recovery seems to fall well short of that figure) is an unrealistic approach if the object is to achieve a fair and just system of costs: all cases vary and the amount of costs that it is reasonable to recover in any particular case will depend on the facts of each case. The present system in England and Wales allows for reasonable and proportionate costs recovery to be measured in the context of the facts of each case and a move away from this position would be a retrograde step, not an advancement. In addition, it is likely that a change to a fixed costs regime will drive away commercial work from this jurisdiction.

7. Our conclusion is that the best way of achieving costs savings for court users across the spectrum of complex specialist chancery litigation, consistently with doing justice, is to have greater and more effective judicial involvement in case management than at present, which means more judicial resources must be made available with enough time for judges to read into cases properly and case manage effectively. Effective case management requires the court to be sufficiently familiar with a case to make "bold" decisions about the scope of disclosure, witness statement and experts, about minimizing duplication of effort and documents, and about directing the course of the proceedings to and at trial, as set out below. This should be coupled with relatively simple procedural changes (as set out below) which ensure that legal work is directed at the important contentious factual and legal issues in a case. Such an approach will control actual costs. This in itself will be a significant advance. Moreover, if actual costs are kept within reasonable bounds, then the starting point on detailed assessment

will make it easier to keep recoverable costs within reasonable and proportionate bounds.

Small and Fast Track cases and other Fixed Costs regime applications of particular relevance to the junior practitioners at the Chancery Bar

8. The existing range of fixed costs should not be extended further. Retrospectively assessed reasonable and proportionate costs with a wide discretion are the best and fairest approach.

9. The rule that there are generally no costs paid in small claims track cases (CPR rule 27.14) should not be extended because it is contrary to principle that a successful defendant should not have his/her costs paid – the claimant has a choice whether to sue but the defendant to a completely unmeritorious claim of £5,000 or under has almost no recourse in respect of his/her costs.

10. The rationale behind the small claims track appears to be that there would be no lawyers involved or that it would be disproportionate for lawyers to be involved. In our experience this is not the case in practice. It does not follow that a low value case is a straightforward case. Cases are very often too complicated for litigants in person to deal with without legal advice. The party who thereafter chooses to invest in a lawyer to present his/her case to ensure a just outcome is then unfairly penalised by being unable to recover those costs if he/she is successful. It is doubtful whether the existence of the small claims track makes justice more accessible to members of the public. For the large companies caught up in litigation within the small claims track the reality is that they have little choice but to instruct lawyers to act on their behalf. Often they are forced to defend unmeritorious claims by litigants in person and it is wrong in such cases that the claimant is not liable for their costs.

11. The current fixed costs regimes in respect of possession claims and charging order applications and elsewhere in CPR Part 45, (if they are indeed a genuine attempt to estimate reasonable costs) are wholly inadequate and create injustice. Fixed costs can only be acceptable if they represent a genuine estimate of the reasonable costs which will be incurred.

Extending the Fast Track fixed cost regime

12. There is no sensible or principled reason to cap the advocate's fees when there is no cap placed on the solicitors' fees, as is currently the case in Fast Track cases.

(i) The existing Fast Track Costs Regime

13. In respect of fixed advocates' costs in fast track trials, there is an ongoing concern about the practice of some solicitors to instruct Counsel for less than the maximum allowable fee but then to claim the maximum fee for the client on assessment. There has recently been a change in the wording of the N260 form to ensure that solicitors certify that disbursements will be paid as set out in the schedule, however, it appears to be the Law Society's view that Rule 46.2(2) requires the court (save in unusual circumstances) to award costs at the fixed rate without regard to the costs actually incurred and that it is therefore not wrong in principle for a solicitor to instruct counsel at a lower fee and subsequently claim and recover the fixed fee provided he accounts to the client for the difference. Our view is that that is contrary to the wording of Rule 46.1 which says:

"(1) This Part deals with the amount of costs which the court may award as the costs of an advocate for preparing and appearing at the trial of a claim in the fast track (referred to in this rule as "fast track trial costs")

(2) For the purposes of this Part-
(a) "advocate" means a person exercising a right of audience as a representative of, or on behalf of, a party; ..."

14. In light of that provision it is difficult to see how a solicitor could claim a sum as "fast track trial costs" if that sum (or part of it) is not actually part of the cost of the advocate. Under the existing Fixed Cost regime the advocate may also be paid more than the recoverable cost. Thus in reality there is often a shortfall between what the innocent party can recover under the fixed cost regime ands what he actually pays his solicitor and advocate. The current fixed cost regime can therefore often work to the disadvantage of the successful party.

15. Our view is that, given this friction between Rules 46.2(2) and 46.1, there must be an argument that an amendment is necessary to clarify the position. Further, and more importantly, insofar as there is any extension to the fixed costs regime, it must be ensured that such abuse by solicitors cannot occur.

(ii) Extending the Fast Track Costs Regime

16. The Preliminary Report does not give any specific detail about what is proposed in this regard. There needs to be flexibility to allow for the varied nature of chancery work and its inherent complexity, and to allow for the difficult and time consuming points that can arise: in a small case, a few hundred pounds can be of considerable importance to the client and/or can turn on a complex legal or factual issue (particularly in chancery work). Such points necessitate and justify time and attention that might appear to be disproportionate on a broad cost to money value approach.

17. Fixed costs must be realistic and we propose there should be scales that reflect complexity otherwise such a system would not operate fairly and might operate to prevent a litigant from being able to bring a good but complicated claim. Value does not determine complexity or indicate the work involved. Some low value cases can be factually and legally complex resulting in higher costs; conversely, some high value cases can be dealt with relatively cheaply as they are straightforward. For example, there might be a need to clarify the law. Low value does not equate with trivial or insubstantial.

18. There would need to be exceptions for cases where there is no money value (where the main claim is an injunction a pure financial cap is inappropriate) or where money value does not reflect the reality of the importance of the matter to the clients.

(iii) The need for a discretion

19. The court must have an overriding costs discretion (as per s.51 of the Supreme Court Act 1981). This discretion ought to include a discretion to award costs on an indemnity basis (e.g. the successful defendant who sees off a hopeless case). Subject to this, there should be a range of recoverable fees (say three scales distinguishing cases as simple, moderate and complex) allowing higher recoverable costs as complexity increases. There should be a fourth scale (invoked if the trial judge so orders) on which costs are at the discretion of the court – this to allow costs to be awarded on a higher scale than the strict money value scale and to allow an absolute discretion to award reasonable costs in exceptional cases. A discretion would permit the court to reflect factual or legal complexity as well as conduct in money claim cases. A pure discretionary scale would

deal with exceptional cases and the many areas of chancery work that do not have a money value (see below).

20. We draw attention to the old practice in the County Courts where, in proceedings to which the County Court money scales did not apply, costs were on such scale as the judge when awarding costs, or the taxing official when assessing the costs, determined. This was achieved by the trial judge making an order that either placed the costs on a higher scale or ordered costs to be in the discretion of the taxing officer. CCR 1981 O.38 r.(6) was as follows: "In any proceedings in which the judge certifies that a difficult question of law or a question of fact of exceptional complexity is involved, he may award costs on such scale as he thinks fit." A similar provision should form part of any fixed cost regime.

21. The need for flexibility is apparent when the extensive range of non-money value chancery/equitable claims is considered. This can be done by, again, looking at the old County Court Practice which excluded from the scales *inter alia* the following:

A: <u>Cases falling within the County Court Equity jurisdiction, namely</u>:

- administrations of estates
- execution of trusts
- declarations that a trust exists
- applications under s.1 of the Variation of Trusts Act 1958
- foreclosure or redemption of mortgages
- enforcement of charges or liens
- specific performance, rectification, delivery up and cancellation of any agreement for the sale, purchase or lease of property
- maintenance and advancement
- dissolution or winding up of partnerships
- relief against fraud or mistake

B: <u>Other chancery work would include the following</u>:

- actions for the recovery of land
- actions where title is in dispute including lease or license disputes
- mortgage actions

- landlord and tenant possession actions
- disputes involving constructive and resulting trusts
- Inheritance Act claims
- non-monetary restitutionary claims
- injunctions
- declarations
- boundary disputes
- relief against forfeiture (or other possession orders)
- contentious probates
- grant or revocation of probate or administration
- committal proceedings
- contempt proceedings
- enforcement or discharge of undertakings

22. All the above would either need to be exempted completely from any money value fixed costs regime or would need to be on a discretionary costs scale.

23. Pre-trial work done by barristers and in-house counsel must form a distinct and separate category of costs from pre-trial work done by solicitors. There must thereafter be a separate fixed cost for the advocate's trial fee. The fixed cost must be apportioned in this way and not left to the discretion of the solicitor or client.

24. The starting rates must be set at realistic levels and should only be determined after consultation. Reviews of the recoverable rates must be carried out regularly (at least annually) and there should be a default provision linking the rates to a measure such as the RPI. The obligation to review rates probably needs to be enshrined in statute because the indications are that rates are not, in practice, reviewed regularly in fixed cost regimes.

Extending the fixed cost regime above the fast track

25. Chapter 23 of the Preliminary Report considers whether there should be a fixed cost regime above the Fast Track and expresses the view that some form of fixed costs regime or similar regime may well suit the best interests of court users. It is understood that the proposal is to extend such a regime to cases with a money value of £25,000 -

£500,000 (or possibly £1m). It is not clear from the Preliminary Report what range of work is included in the description "business disputes".

26. Having considered matters at length, we are unable to support an extension of the fixed cost regime above the Fast Track for the reasons set out below.

27. Commercial litigation between £25,000 - £500,000 (and above) forms a significant area of work in chancery litigation. A Questionnaire was sent out to members of the Chancery Bar Association asking for responses to the proposal to extend the fixed cost regime above the Fast Track. The clear majority view was that a fixed cost regime cannot operate fairly in chancery/commercial work. The points made included the following:

    (i) Cases and parties are not the same; no "one size fits all" as all cases are different; the variety of cases makes it impossible to set fixed recoverable costs applicable to all cases.

    (ii) Many cases have no identifiable money value.

    (iii) The sum in dispute does not necessarily reflect the complexity of the issues or the importance of the case for many businesses; a claim of several £100,000 is very important.

    (iv) It could bring about injustice because of unrecoverable costs; it would be unjust as a vindicated party will be left out of pocket to a greater extent than at present.

28. In addition, a fixed recoverable cost regime would favour the litigant with deep pockets. Rather than providing a "level playing field", a fixed costs regime (like costs capping) will tip the balance in favour of the litigant with deep pockets as analysed in the next paragraph.

29. While a fixed recoverable costs regime might limit recoverable costs, it will not limit costs as between solicitor and client and, as this is a matter of private arrangement between solicitor and client, these costs cannot be subjected to a "tariff" regime. This means that there will always be a shortfall between actual costs and recovered costs:

    (i) As regards inter partes costs: Commercial litigants will, more often than not, try and avoid the costs of a detailed inter partes assessment. Such clients are therefore more prepared than, say, personal injury litigants, to "take a

commercial view" about what is an acceptable level of payment for costs. This enables settlements to be achieved as low as 70% - 75% of actual costs. Obviously, the larger the bill, the more the room for movement. Such clients do not settle at or around this level through any particular concern about holes or weaknesses in their bills or because they think this is all that would be achieved in a detailed assessment. These settlements are driven by the commercially minded litigant wanting to avoid any further costs and involvement in the litigation. A hard fought assessment, even if resulting in a better recovery than 70% - 75%, will incur its own irrecoverable costs: absent some point that goes to the heart of the entitlement to recover costs (rare), settlement thinking on both sides invariable follows the broad reasoning that 15% - 20% might be knocked off any large bill, a further £YY will be risked on costs of which £Y will be irrecoverable, making it sensible to agree a 25%-30% reduction.

(ii) As regards solicitor client costs: In this age of computer records and improved attendance notes etc, absent some "killer" point (rare) it is unusual to reduce a bill by as much as 20% (on which the burden of the costs of the assessment usually turns). Solicitor – client assessments in commercial cases generally result in a reduction of around 15%. Commercial clients generally accept that they are liable for the shortfall between inter partes recovery and own costs; solicitors acting for such clients generally expect payment of the shortfall.

30. Accordingly, the two-thirds figure contemplated by the fixed costs regimes considered in the Preliminary Report is less than the average negotiated "settlement" range and less than the likely actual recovery on a detailed assessment. This means that, a fixed costs regime will operate less favourably to successful litigants than does the present system.

31. Further, a fixed recoverable costs regime will have the effect of widening the gap between the sum the innocent party recovers from the other side under the present system (whether negotiated or on assessment) and the sum the innocent party must pay his own solicitor (which will remain unchanged). A fixed recoverable cost regime will therefore lessen the burden on the party in the wrong at the expense of the successful party. This is wrong in principle, unfair to successful litigants and (judging by the experience in Scotland) will drive commercial work away from England and Wales.

32. Importantly, a fixed costs regime is as open to tactical manoeuvring by wealthy litigants as the present system but does not have the benefit of allowing reasonable litigants, subjected to such tactics, to recover their reasonable and proportionate costs in full as under the present system.

33. We are unaware of any call from chancery litigation court users (or the profession) to extend the fixed cost regime above the Fast Track. We feel that it is very doubtful that litigants involved in chancery disputes in excess of about £100,000 in value, or chancery disputes that have no real money value but are important in terms of establishing rights etc, have a general view that costs are disproportionate. None of the sources identified in the Preliminary Report as expressing concerns about costs are associated with chancery litigation[1]. Certain aspects of the Woolf Reforms have increased litigation costs as is generally recognized (e.g. protocols). However, apart from the CPR effect (which is no fault of the profession or litigants), none of the causes of increased costs identified in the Preliminary Report apply, in any material degree, to chancery litigation[2]. The "costs war" (which was largely about CFAs following the cost shifting changes introduced in 1999) is on the wane and was not generated by chancery litigation.

34. There appears to be a perception on the part of Judges that costs are "too high". While judges see costs schedules, few (particularly at higher level) have had much experience of actually conducting litigation under the CPR and it is felt that this might colour their perception and understanding of the demands of litigating under the CPR.

35. A fixed recoverable cost regime can only operate fairly for the litigants in a jurisdiction where the bulk of the litigation is straightforward or relatively straightforward. This is not the case with chancery litigation in England.

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[1] Chapter 1, paragraph 1.3 identifies the following sources: (i) liability insurers, (ii) the media, (iii) claimant lawyers protesting about massive costs being run up as a result of procrastination by liability insurers.

[2] Chapter 1, paragraph 1.2 identifies the causes of increases in costs as: (i) the introduction of CFAs, (ii) shifting success fees and ATE premiums to defendants, (iii) Woolf reforms such as pre-action protocols and other CPR requirements for front loading costs, and "the detailed requirements of the CPR and case management orders [which] cause parties to incur costs which would not have been incurred pre-April 1999".

Categorising cases

36. The true value of a case to a litigant might have no relation to any money value that can be put on the claim and might not be readily apparent. Many claims do not involve money sums e.g. declarations, specific performance, enforcement/lifting of restrictive covenants, clarification of powers, all cases involving issues of "control" (e.g. the importance of controlling a company might be far greater than the value of the shares). In such cases, there is no "ready reckoner" by which a case can be put into a particular category of complexity, Classification will require an examination of the case to an extent that would only be fair (and possible) if substantial changes are made to the judicial system to provide effective case management at a level substantially above the case management currently provided and this will require material changes (increases) in the funding, organisation and staffing of the judicial system.

37. The number of chancery/commercial cases that will fall into the exceptional category is so great that there is no purpose to a fixed recoverable costs regime for this work, with all the uncertainties such a change will bring (including the real risk, borne out by past experience, that any substantial procedural change results in extensive litigation refining and clarifying the changes). The exceptions to a fixed recoverable cost regime would have to be that costs are at large and at the discretion of the court – this is precisely what the present system provides: the present system is what practical experience has shown over the years to be the best and fairest approach to costs in cases of substance and complexity.

38. A fixed cost regime and fast track are fine for low end cases but there is a point at which the more important consideration is the need to provide all the refinements necessary to handle complex litigation. Very few chancery cases suit a fast track approach – most have legal and factual issues that take the case outside the norm, particularly those cases that come to court: if a case comes to court it is likely to be because of legal and factual uncertainties that experienced lawyers are unable to resolve.

39. Unreasonable conduct by the litigants is presently resolved by the current costs discretion. It will be more difficult to resolve such issues under a fixed recoverable costs regime.

40. There are two conflicting philosophies: (i) providing a sophisticated court system for complex cases; (ii) keeping costs down. The former comes at a financial cost; the latter can only be achieved at a cost to the quality of justice. A fixed fee regime or scale system necessarily works on the basis that there is a reasonable comparison between cases of similar value. In the English system, this just is not the case: beyond the simplest cases (say, straightforward possessions claims; straightforward winding up petitions) in chancery/commercial work no two cases are the same. Broad comparisons might be possible between a few cases but no generalised comparison across the full spectrum of chancery work is realistic or fair.

41. The corollary to a fixed recoverable costs regime is that the Courts must provide greater judicial involvement in cases (effective case management at all stages) which will mean freeing up judicial time and increasing judicial resources – in effect, the costs reduction imposed on the parties must be made up by the level of service provided by the Courts if the fixed recoverable costs regime is not going to reduce the quality of justice in complex cases below an acceptable level. In our view, increased pro-active case management must be provided in any event and this in itself will reduce and control costs within the context of the present (flexible) system without the need for a fixed costs regime.

Proposed improvements in the current system

42. What is needed is not an extension of the fixed recoverable costs regime above the fast track but improvements to the current system, in particular:
   (i) Greater judicial involvement in case management (further comments are set out below in relation to High Value Cases). This will require greater judicial time and judicial resources.
   (ii) Greater assistance to costs judges by trial and case management judges i.e. clear directions about the reasonableness or otherwise of costs (particularly regarding points such as those in (iv) below).
   (iii) Trial or case management judges requiring explanation of areas of high costs, such as pre-action costs and "team" involvement, as a matter of course and commenting clearly upon such costs to assist rigorous assessments by costs

judges – an hour or so spent in this way is likely to have a profound impact on costs, well in excess of the cost of such an examination.

(iv) Encouraging costs judges to look more closely and rigorously at costs, including pre-action costs, the numbers and levels of fee earners involved, potential duplication, the reasonableness of and necessity for work done at trainee and paralegal level and the whole issue of "team" involvement.

(v) Making changes to the detailed assessment process as set out below.

43. The suggestions made below in relation to procedural changes in high value cases are relevant all cases.

44. *The German system*: There are material differences between the German system and the legal system in England and Wales such that no valid comparison is possible. Reference is made to Schedules I and II to this Response which contain Notes prepared by a chancery barrister qualified to practice as a Rechtsanwalt under the German system. In brief: there is no discovery in the English sense (documents are attached to the statements of case); witnesses are called by the judge who examines them; lawyers can ask supplemental questions but cannot cross examine in the English sense; there is no oral argument; there is a different standard of proof with the consequence that trials are less about credibility and less time is devoted to witness evidence; time spent in court is generally very short. Lawyers in Germany do much less than lawyers in England and the amount of work done by English lawyers on cases of comparable value is much more variable than in Germany. In Germany it is reasonable to expect the costs in cases of similar value to be comparable; in England, it is not. Further, it is plain that the fixed cost regime in Germany is possible only because there is substantial cross-subsidisation of low value claims by high value claims: this was the underlying rationale of the German system originally but has now effectively ended. No change in the English system can sensibly be based on the German model.

45. *The New Zealand system*: Change in the English system should not be based on the New Zealand costs model which could not be transposed to the English system with the expectation that it would operate here effectively. New Zealand has a much smaller population than England and Wales and has no fault personal injury liability; these factors reduce the demands on the legal system in absolute terms. The number and size

of large and/or complex domestic cases carried out in the two jurisdictions is unlikely to bear realistic comparison. Further, England is an international legal centre attracting work from around the World.

(i) We believe that case management is more extensive in New Zealand than it is here. As set out elsewhere, we believe that the key to saving costs (at all levels) is pro-active case management on a far larger scale than happens in England at present. We understand that, in New Zealand, a Judge (on his "own motion" or on the application of one or more parties) may at any time hold a case management conference in order to assist the parties in the just, speedy and inexpensive determination of the proceedings or, if practicable, make other interlocutory orders; these may include, but are not limited to, timetable orders. Further, we believe that, as in New Zealand, the judge should consider the scope of "discovery" and whether it should be narrowed – in New Zealand, all parties and the court are involved in ensuring that the discovery process is dealt with as expeditiously and cheaply as possible. This emphasis on case management by the court must result in cost savings and it is this aspect of the New Zealand model, not the fixed cost regime, that should be looked at closely.

(ii) We believe that, in practice, recovery is much lower than actual costs, between approximately one-third and 50% of actual costs in complex cases rather than the target of two-thirds (even two-thirds is too low for the reasons set out above) and that the width of the gap depends upon the type of litigation and the location of the lawyers. Applied to England and centres such as London, Birmingham, Manchester, and Leeds, the New Zealand model would result in an even greater shortfall than is experienced in New Zealand. A fixed costs regime would need many more than one additional band to operate fairly in England.

(iii) It is unclear whether the regime in New Zealand has the effect of reducing legal costs overall or of promoting access to justice.

(iv) Common sense suggests that a substantial gap between actual and recoverable costs will act as a deterrent to accessing justice. The New Zealand model is not designed to, and presumably does not, control solicitor-client costs; so the gap will exist whatever scales are put in place with the consequence that an increased costs burden will be placed on the successful (innocent) party.

(v) In New Zealand, the High Court Rules allow increased costs for a number of reasons including where the nature of the proceeding, or step in it, is such that the time required by the party claiming costs would substantially exceed the time allocated to it under the highest "reasonable" time band. Where increased costs are awarded the court awards an uplift of the scale costs to which the party is otherwise entitled. A solicitor's actual costs may be relevant to the exercise of the court's discretion. In New Zealand the courts are generally reluctant to award increased costs whereas the inherent complexity of chancery work generally, it is probable that the court would need to exercise its discretion fairly constantly to award increased costs under a fixed costs regime.

(vi) Whereas in New Zealand costs might be more predictable than previously, it has been at the cost of the flexibility needed to do justice in any particular case and there is no evidence that the fixed cost regime has had a significant effect on access to justice.

46. Under the New Zealand system, the ABC part of the banding is determined at an early stage by the equivalent of a Master. This could only be done fairly if the court is fully familiar with all the legal and factual complexities of a case. At present, the courts in England do not provide such proficient case management.

47. Further, the initial classification of a case will be important in terms of cost recovery. This is likely to lead to extensive argument about the case, possibly with both sides taking on the court (it is in the interests of the parties to maximise the classification; no doubt, the duty of the court will be to minimise the classification). There will be pressure to emphasise the complexities in the statements of case/witness statement etc so as to maximise the classification.

48. A fixed recoverable costs regime by its very nature will be prone to unfairness unless it allows for exceptions where the factual and legal issues inherent in the case take the case out of the category of simple, straightforward litigation – most chancery litigation is inherently complex, factually and legally: these cases are only litigated because experienced barristers and solicitors find that there are no certain answers to the issues involved.

49. *The system in Scotland*: We have had contact with an experienced Silk practising in Scotland and London who has discussed matters with an experienced Scottish commercial solicitor. The costs regime in Scotland gives rise to a substantial difference between actual and recoverable costs (or "expenses" as they are called in Scotland) without the benefit of creating any real certainty about the level of potential adverse costs. At superior levels at least, the amount of costs is uncertain until settlement or other conclusion of the case; broad assumptions can be made but nothing more. The view is that the unrecovered portion of costs is a significant factor in discouraging commercial litigation: it acts as a disincentive to litigate and the view is that Scotland loses top quality commercial work to England and Wales as a result of the extent of unrecovered costs in Scotland. It is not clear to us what are the positive features that make the system in Scotland attractive and what the benefits of adopting that system might be if, as we understand matters, the system does not achieve certainty about adverse costs but does result in a substantial shortfall between actual and recoverable costs.

50. For all the above reasons, the proposal to create a new fixed recoverable costs regime cannot be supported in relation to chancery/commercial litigation.

51. It is our view that, instead, the procedural changes we suggest in relation to high value cases should be applied to low and medium value cases to reduce costs. Such changes, the risk of personal liability for costs coupled with active case management by judges (and Masters) familiar with the areas of work involved are the keys to keeping <u>actual</u> costs within the bounds of comparative reasonableness. Post trial case management with the trial judge reflecting in the costs order, where appropriate[3], any material conduct issues which increased costs on either side, or any obvious "unreasonable" areas of costs[4] or, importantly, where not reflected in the costs order, clearly identifying such areas of concern for the benefit of the costs judge, coupled with the current after the event assessment regime (when the product of the work is available to guide the assessment of reasonableness and proportionality), are the keys to keeping <u>recoverable</u> costs within comparatively reasonable bounds.

[3] We draw attention to what is set out in the Response on behalf of the Bar Council about the proper issues-based approach to costs orders.

[4] E.g. excessive work (teams; paralegals etc); material parts of witness statements off the point or merely citing what is in the documents or going to credibility; excessive or unconsidered disclosure etc.

52. If a fixed recoverable costs regime is introduced, the court must have an overriding cost discretion as per s.51 of the Supreme Court Act 1981. Fixed cost regimes allow only a certain amount of time for particular work either expressly or in effect. Time could be greatly increased through no fault of the party claiming costs e.g. excessive disclosure by the other side. The Court must have a discretion to allow costs in excess of the (otherwise) appropriate band either for the whole case (if appropriate such as where the conduct of the other side has driven up costs overall) or for specific sections of the case or specific items of work (e.g. disclosure where there has been excessive disclosure).

53. In addition, we would say that the upper financial limit for money claims subjected to a fixed costs regime above the Fast Track should be no more than £150,000.

54. Further, there could be no flat rates across the Country because overheads are substantially greater in certain parts of the Country than in others e.g. London vs a small town high street practice. Banding similar to the current guidelines for solicitor hourly rates as set out in the Cost Practice Direction Part 48 would be appropriate.

55. Yet further, there should be a wide ranging review of how such a system works, say, two years after its implementation.

<u>High value business litigation</u>

56. The CPR have contributed to the rapid drop in the number of claims issued. However, there has been little overall change to the basic way in which cases have been conducted and, if anything, the costs of taking a case to trial have increased as a result of the CPR.

57. There have been some improvements as a result of the Woolf reforms. However, the experience and view of many is that the CPR have become too detailed and complex and are subject to constant changes. If it is impractical to take the best bits of the CPR and revisit the RSC, the next best approach would be to let the procedure settle down and stabilise before undertaking yet further radical reform. A much longer timetable is necessary if matters are to be looked at properly and if responses are to be objective rather the narrow view of interested pressure groups.

Pro-active case management by the Court

58. The most important step that can be taken to lower costs would be to increase the degree and level of judicial case management. This will reduce costs to the litigants in two ways: firstly, the court will be assuming a much greater decision making role which will shift some of the burden of costs onto the State; secondly, by being in a position to direct and control e.g. what disclosure and evidence is needed (in witness statements; at trial), the court will reduce the costs incurred by the litigants in these stages of the litigation process. At present, courts are rarely up to speed with the case and cannot impose their will on the parties effectively. For the same reason, courts are rarely able to resolve disputes between the parties on case management matters:

    (i) Effective case management requires more judicial time to be spent on the case. This will require freeing up judicial time to allow judges to read into cases properly.

    (ii) Although there is no criticism of Chancery Masters, case management in all cases of complexity should be provided at judge level and "docketing" should be considered.

59. It is evident that judges at all levels (including the High Court Chancery Division) are not given adequate time to read into cases. It is plain that this is the case from what is said and seen at court; it is borne out by judges in private conversations. Complex cases being heard by judges (of ability) who have not been given a proper opportunity to familiarise themselves with the case. This lengthens hearing times and makes for an unsatisfactory decision process.

60. The problem of inadequate pre-reading is particularly evident at Case Management hearings – this aspect of the Woolf reforms has not worked: usually the court is not sufficiently familiar with the case to provide effective case management. It is not suggested that the Chancery Division should follow the practice of the Commercial Court and TCC of giving over Fridays to case management: to the contrary, flexibility is needed and case management appointments before Judges should take place on any day, as and when needed.

61. Costs could best be reduced by a "back to basics" approach that attempts to avoid duplication (in producing documents; in setting out facts and law). The starting point would be to restore prominence to pleadings supplemented by a working List of Issues which should come not at the end of the case just before trial as at present but immediately after close of pleadings and before Disclosure. The List need not be a complex, detailed document (as tends to be the case with the List of Issues presently produced for trial purposes) but should identify the important issues in terms of disputed facts and law based on the pleadings with the object of providing a clear simple guide for the Court and parties when contemplating case management directions and, particularly, at this stage, Disclosure. The List should be revisited after Disclosure to see if it needs amendment.

62. Witness statements and all steps thereafter should concentrate on the contentious issues. Decisions about experts should only be made after witness statements from witnesses of fact (and as regards the instruction of experts, see our suggestions below).

63. There is wasteful duplication of non-contentious facts in witness statements, expert reports and skeletons etc. It is suggested that an attempt should be made to introduce a step of requiring an agreed statement of facts at an early stage of the proceedings which can be used as widely as possible by all parties, allowing other steps and documents to concentrate on the contentious issues (of law and fact). This might not be possible in every case and might work better in some areas of work than in others, but in many cases non-contentious facts are endlessly repeated, sometimes at length when an agreed statement would obviate this and shorten (or make more productive) the time spent on the case. It should be workable but is likely to be so only with greater pro-active case management by the Court.

64. Documents are duplicated with each new bundle produced for successive applications. With pro-active case management, this should be avoided, not only by Court direction (or prohibition) but because pro-active case management will mean that the Court has (and will want) one working bundle that is supplemented (not duplicated) as the case progresses. The Courts will have a single marked up working bundle without duplications. This change of practice would work most efficiently with a single judge having control of case management through to trial. The change in approach can be

emphasized by cost penalties for exhibiting to witness statement the pleadings or documents already exhibited elsewhere; serious cost penalties can be imposed for trial documents containing endlessly duplicated material. What this will mean is that the profession will return to the practice of putting thought into bundles rather than devolving matters into the hands of the least costly fee earner available with instructions to include "everything".

65. A "back to basics" approach would include reminding Judges that orders or requests for the production of lists, schedules, tables, notes etc incur costs and should not be sought unless there is real cost-effective benefit.

66. Trial Bundles should be required well in advance of the trial so that case management principles can be applied to eliminate unnecessary duplication and in resolving any issues. The approach would be to see what, if any, changes or additions need to be made to the working bundles used pre-trial by the lawyers and Court. True core bundles would be identified. Bundles should be resolved and then paginated uniformly before skeletons are produced.

67. As regards the trial itself, time would be saved by having judicial reading after opening (will save time and costs later).

Procedural changes

68. The Preliminary Report seeks comments on whether any cost saving changes can be made to procedural steps. The views of members of the Chancery Bar Association were sought by way of two Questionnaires and the responses are summarised (with associated comments) in Schedule III.

69. **Disclosure**:

(i) A system of disclosing only documents relied upon would reduce costs but does not result in disclosure of the documents that help the other side – there is no sensible basis on which the legal system can move away from the current practice of disclosing all documents whether relied upon or not. However, effective case management would identify the nature and extent of Disclosure working from the List of Issues.

(ii) There are cases in which detailed Lists are necessary but it is felt that there are many cases where a description by class of document could suffice. Accordingly, what could be tried is a default position of description by class of document with the requirement for a detailed List (usually in complex cases or uncertainty about the source/nature of documents) on application (a case management decision): with a general description and access to the document, the other side can have the burden and cost of searching for documents that assist. An application for specific disclosure after access should take care of most problems.

70. **Witness statements**: Witness statements are a cost centre but are a considerable improvement – not only do the parties know in advance what will be said, the court has an accurate record (which is useful when judgment is reserved).

(i) Witness statements should be confined to the "material facts and issues" (being the facts and issues identified in the statements of case or List of Issues) unless the court directs otherwise (a case management decision). The court should be involved through (informed) case management directing what issues are to be covered.

(ii) Witness statement should not cover matters that are clear on the face of the documents.

(iii) Witness statements should not set out material that goes solely to "credibility".

(iv) Witness statements must be in "client's own words". This should be considered as a matter of course by the case management judge at a pre-trial review and breaches must be remedied at the party's own cost.

(v) In less complex cases, the default position could be witness statements in summary form (unless the court otherwise directs).

(vi) There should be more examination-in-chief: the court should direct at a PTR what evidence it wishes to hear (in chief and under cross-examination) after consideration of the statements of case, skeleton arguments and final List of Issues.

71. **Experts**: Experts can be a sizeable costs centre. This is an area that would benefit from effective case management by an informed court. The right to instruct one's own expert (on making out a case) must be continued. The parties and the court should

identify and formulate the question to be put to the expert(s) before experts are instructed. There should be a common letter of instruction to the experts where more than one expert is instructed.

72. **Skeleton Arguments**: Skeleton Arguments increase costs and have become more and more detailed. However, the benefits vastly outweigh the costs. Not only do skeleton arguments provide notice of the argument, they provide a valuable reference for judges to return to when judgment is reserved.

(i) Pre-hearing skeletons should be sensibly "skeletal" but this will need a culture change that can only be brought about by the courts adopting a flexible approach. At present, it is felt necessary to cover every point in some depth to avoid criticism from the court (which invariably leads to criticism from clients).

(ii) In complex cases the parties should prepare written submissions that they speak to in closing argument (cases shift and flow in accordance with the evidence and indications from the Bench – such a document will identify the case in its final form and provide the Judge with a written record if judgment is reserved).

(iii) Reference to authorities should be confined to those needed to establish a principle or, where the principle is plain but needs illustration in its application to a particular factual situation, limited to the minimum required.

73. **Protocols**: Protocols increase costs. We suggest that a culture of sensible correspondence (on all sides) should be promoted before litigating rather than a formal protocol. A general principle applicable to all cases requiring a fair statement of the case in a letter before action and a responding fair statement of any defence, with all such letters automatically being "without prejudice save as to costs", might be a better way to approach matters and reduce costs. There is no need for further rules providing for specific costs consequences; it should be sufficient to rely on the general discretion to have regard to *Calderbank* letters when dealing with costs, so that if a party can be seen with hindsight to have behaved unreasonably and thereby increased costs, this can be taken into account.

74. **Cost capping:** Costs capping should not be needed at all. A system of costs-capping has to steer an impossible path between the Scylla of increased costs by spawning satellite litigation and the Charybdis of causing injustice by prohibiting recovery of

costs which might turn out to be justified. The existing requirements that costs must be reasonable and proportionate (if applied robustly) should be a sufficient deterrent to a party who incurs unnecessary costs without the need for costs capping – i.e. he does so at his own risk. There is no need to rule on this in advance (at a time when the judge will not fully understand the issues). Instead, the judge could give a provisional indication that he cannot at present see a justification for particular costs and that the party intending to incur the expense (e.g. of an expert) will have to make out his case for recovery of costs in due course. The judge could also protect the other party by ordering sequential disclosure of experts' reports, so that the other party could see whether the expense was justified before incurring it. Further:

(i) Effective case management (see elsewhere) is the most effective way to control costs. This, together with greater judicial intervention by way of direct comment on high areas of cost in any particular case (see elsewhere) to give assistance to costs judges and so enabling rigorous assessments as a matter of course will provide effective control of costs.

(ii) Unless carried out by a judge with experience in the particular area of work, wholly familiar with the legal and factual detail of the particular case, setting a cap before the work is carried out is a blunt instrument. There is no reason at all why a successful litigant should be restricted in what he can recover by a view taken before the event. Judging the reasonableness of work before it is done is an exercise in the abstract that is unreliable and unfair. The reasonableness of work can only be judged once the work product is available to be considered.

(iii) If costs capping is retained, it should not be extended but must be confined to exceptional cases as it is at present.

75. **Costs management**: Unless this is carried out by a judge wholly familiar with the detail of the case, including the legal and factual complexities, costs management by the court will be ineffective and unfair. Any step in this direction should only be taken in exceptional cases and then only by a Judge fully conversant with the case.

76. **Judges**

The Questionnaires asked the question: "In your experience are costs ever increased because a judge was unfamiliar with the area of law with the result that there was a

longer hearing/trial or a need to appeal?" The response was: Yes = 23; No = 4. The comments received were as follows:

(i) Although problems rarely occur with High Court Chancery Judges in the Chancery Division, difficulties are experienced elsewhere, particularly in the County Court with District Judges, with chancery work - property, sale of land, land law, Landlord and Tenant, easements, insolvency, company law cases; cases involving trusts and a deceased's estate where the judge does not understand the nature of the deceased's interest; probate applications in the Principal Registry; trust matters in the county court; family judges hearing non-contentious probate applications under non-contentious probate rules; Court of Protection applications in provincial centres with little Court of Protection experience.

(ii) Also mentioned were: instances where Circuit Judges hear High Court cases in chancery/commercial fields; chancery matters heard by QB judges; QB practitioners sitting as Chancery Deputies.

(iii) Judges having inadequate time to read into cases properly were mentioned: Deputy High Court judges having cases transferred to them at short notice and in the County Courts (which are increasingly taking substantial cases) giving the judge only limited time to read and only the sketchiest knowledge of the case.

(iv) Other factors causing an increase in costs were: judges refusing to hear cases outside their area of expertise; and often outer-London County Courts transfer quite simple matters to the Chancery List at Central London resulting in delay and sometimes wasted hearings which is all the more vexing where proceedings must be commenced in the particular court e.g. possession proceedings.

(v) As regards Inheritance Act claims, one response stated that there is complete indifference in the High Court and Central London to having these cases dealt with by judges who had some experience of the field while at the Bar.

(vi) Positive points were made: in smaller cases circuit judges are fine once brought up to speed even if it takes a bit longer – a good mind and time suffices; the Chancery Masters are good.

(vii) The view was expressed that in the County Court, both in terms of law and facts, there should be stricter allocation to ensure that judges with experience in

the relevant area are allocated the case even if this means delay – delay is preferable to increased costs and/or a party feeling he has not had justice.

(viii) As regards the Court of Protection: These decisions are often at least as important as decisions taken at Circuit Judge level and, in cases of complexity, should be taken at Circuit Judge or higher level.

Specific Chancery Litigation issues – Chapter 33 of the Preliminary Report

77. Chapter 33 of the Preliminary Report is directed specifically at chancery litigation and requests information on a number of issues relevant to costs in chancery litigation. The issues identified in the Preliminary Report were put to members of the Chancery Bar Association in a Questionnaire. The response was as follows (see also Schedule III – additional comments):

(1) Can anything to done to encourage early settlement of probate claims?

One response considered it necessary to codify the existing cost principles and abolish the possibility that if the litigation is the deceased's fault the loser might not have to pay costs and might even get costs out of the estate.

Another response sought changes in the rules/approach suggesting that Re Kostic should perhaps be reigned in: the rules ought to reflect the fact that in probate claims costs might not always follow the event but make it clear that it will only be in exceptional cases that the costs order will be different – otherwise people will not expect to face the normal costs risk in probate cases and this will not encourage settlement.

Others thought that early settlement could be assisted in various practical ways rather than by rule changes. The comments in the Summary to the Chancery Bar Association Questionnaire are pertinent.

(2) Should the special cost rules and guidelines which apply to contested probate claims under CPR 57 continue?

Yes = 13; No = 1

Rule changing comments were:

(i) 57.7(5) should apply to claimants in a claim for revocation of a grant in common form.

(ii) Disapply Part 36 in probate claims – there is no substantive difference between Claimant and Defendant; it is pure chance who issues first and these cases are all or nothing.

The Preliminary Report makes a mistake at paragraph 3.2 which does not state the conventions as to costs of probate actions correctly – where there are reasonable grounds for opposing the Will but the losing party is not awarded costs out of the estate, he is not ordered to pay costs see Williams Mortimer and Sunnucks on Executors, Administrators and Probate 40-06 and Re Kostic.

(3) Should there continue to be a departure from the general CPR 44.3 costs rule for appeals to the Court of Appeal in probate proceedings?

Yes = 7; No = 9

(4) Should the costs neutral regime (costs come out fund) be extended to all parties in all trust/estate cases?

Yes = 3 (qualified); N = 20

(5) Should only 'proportionate' costs come out of the estate with all costs above the proportionate limit being borne by the party incurring them (or by the losing party)?

Yes = 7 (in many cases qualified); No = 10

The comments set out in the Summary of Responses to the Chancery Bar Association Questionnaire are pertinent. The weight of opinion is against a change.

(6) Should such a cap be based on a percentage of the value of the estate rather than the current cost capping practice of looking at the 'reasonable costs' of litigating all issues?

Yes = 2 (one qualified); No = 12

(7) Should a costs neutral regime (all costs out fund) be extended to Inheritance Act claims?

Y = 3 (qualified); N = 15

A significant majority is against the proposed change (an approach that is reflected elsewhere as the view is that the risk of personal liability for costs is a major factor in controlling costs). In inheritance cases the fact that there is a finite fund about which the parties are arguing and the fact that, although a successful claimant will usually be awarded costs, a carefully judged Part 36 offers can nevertheless put the claimant at risk as to costs, means that negotiated or mediated settlements are common; thus, the risk of personal liability encourages settlement.

It is of assistance to look at the practice in comparable proceedings such as ancillary relief. The rationale for the new costs neutral regime in ancillary relief proceedings was explained by DCA as: "[t]he purpose of applying a 'no order for costs' principle in ancillary relief proceedings is to stress to the parties, and to their legal advisers, that running up costs in litigation will serve only to reduce the resources that the parties will have left to support them in their new lives apart."

We refer to the fuller comments on this point set out in Schedule III

(8) Are Beddoe applications too often made out of abundance of caution?

Yes = 10; No = 12

This is an issue on which the Judges and practitioners need to work together to find a procedure that permits firm and confident advice to be given.

It is suggested that there should be greater clarity in the commentary to the CPR about when such applications are and are not necessary; applications are often made where there is no need or it is obvious that they are going to fail.

(9) Could more Beddoe applications be dealt with on paper?

Yes = 17; No = 1

It is suggested that the basic rule should be that all Beddoe applications should be on paper save in exceptional cases where the Court requests a hearing having read the papers. The point might best be answered by the Chancery Masters.

(10) Should a special form of costs capping order be developed for neighbour disputes (boundary disputes) for example limiting recoverable costs to 50% of the value of the rights in issue or at a fixed sum of say £15,000?

Yes = 7; No = 16

(11) What are the main cost centres in such disputes and can anything be done to reduce costs without ignoring the importance of matters to the litigants?

Virtually every aspect of boundary dispute litigation was mentioned at some point as a costs centre (see the Summary of Responses to the Questionnaire at Question 21 in Schedule III). Suggestions that could be given effect by changes to the Rules or a Practice Direction were:

(i) to have proper case management (specialist District Judges overseeing a case to trial would reduce time and costs coming to trial);

(ii) compulsory mediation.

(iii) an early joint meeting of experts.

(iv) a requirement that all plans be of the same scale and, one copy, be on a material that can be superimposed on another copy (or by software).

(v) see also the suggestion set out elsewhere under the heading "Boundary Disputes".

See also paragraph 80 below.

(12) Should there be a cap on recoverable costs for minority shareholder petitions?

Yes = 4; No = 12

(13) Should the cap be related to the value of what the shareholders in minority shareholder disputes are arguing about rather than to the reasonable costs of litigating every issue?

The view most often expressed was that very often the value of what is being argued about is in dispute which makes it very difficult to set a cap by reference to value and/or that value is not necessarily an indication of value and/or minority shareholder disputes are often about control and similar matters that cannot easily be valued.

(14) What are the main cost centres in minority shareholder disputes and can anything be done to reduce costs?

Several suggestions were made - see the Summary of Responses to the Chancery Bar Associations Questionnaire.

(15) Should the Section 986(5) special rule as to costs continue to apply?

All responses were in favour of continuing the special rule.

(16) Part 26 Schemes of Arrangement and Part VII Transfers

The following comment was added by a specialist practitioner:

The practice of the court in relation to the costs of opposing Part 26 schemes of arrangement and Part VII transfers. Persons affected by the scheme of arrangement or business transfer, particularly members or creditors in the case of a scheme of arrangement and policyholders in the case of a transfer of insurance business are entitled to appear on the application for sanction; the evidence and submissions of opposing creditors or members may well assist the court in its scrutiny of the proposal even if the court is satisfied that sanction should be given. As a rule the court will not make costs orders against objecting members and creditors where their objections are not frivolous and have assisted the court; sometimes no order is made, sometimes an order is made in favour of the objecting party. See para 22-24 judgment of David Richards J. in Royal Sun Alliance v British Engine [2006] EWHC 2947 (Ch) It is essential that this practice is preserved. Creditors schemes in particular are becoming more and more aggressive and nothing should discourage scrutiny by the court of such proposals.

(17) Should any changes be made to the cost rules in the Court of Protection?

The majority view was that no radical changes are needed and that the two general rules operate satisfactorily in most cases.

A Note is attached in Schedule IV written by specialist counsel with considerable experience of the Court of Protection and General Editor of Heywood and Massey's Court of Protection Practice suggesting a modification to the existing rule.

(18) Should the current costs exceptions for the declarations or discharge of restrictive covenants continue?

Yes = 10; No = 5

(19) Do the provisions of rules 7.33 and 7.40 of the Insolvency Rules 1986 operate fairly and provide adequate costs protection in insolvency proceedings or should these rules be modified or extended in any way?

Three responses were received: two responses said that the current rules operate fairly and do not require any change; one response stated that Rule 7.40 should only apply if the court has expressly drawn the matter to the attention of the litigant

(20) Do the current rules and practices relating to costs of trustees in bankruptcy, liquidators, receivers and administrators, the official receiver etc operate fairly and provide adequate costs protection to both parties?

Six responses were received:

(1) Three expressed dissatisfaction about the size of costs incurred by liquidators and similar "officials" in insolvency litigation. Their views are set out in greater detail in Schedule III. Their comments are worth reading because they reflect the concern expressed by Davies/Baister in their paper on Insolvency Costs. There is therefore a significant view that there is a need to look into matters (although half our responses were to the exact opposite effect). We cannot improve on the Davies/Baister suggestions save to repeat the theme of our response, namely, that active case management (rather than costs management, although it might come to the same thing) is the key.

(2) Three expressed approval and commented as follows: the current approach operates fairly well as long as orders for security are "full value"; the Practice Statement on the Fixing and Approval of the Remuneration of Appointees 2004 needs simplification and clarity.

(21) Should there be any special cost rules applying to administrations?

Two responses were received both saying that there should not be any special rules applied to administrators.

(22) In "hostile" pensions litigation the normal cost rules apply unless either or both parties obtain a Beddoe order; in "non-hostile" pensions litigation the normal approach is that costs of both sides will come out of the pension fund even if no Beddoe order has been made: does this approach operate fairly or are changes required?

The view of all was that the current approach operates fairly and requires no change.

(23) Trustees may be ordered to pay costs themselves if they are found to have behaved unreasonably or for their own benefit: does this operate fairly or are changes required?

The strong majority view was that the current approach operates fairly and requires no change.

(24) Are any special costs rules (in addition to those mentioned below) required for intellectual property claims or are the general costs provisions adequate and fair.

The responses were that the general provisions are fine and no special rules are required

(25) In intellectual property claims should the practice relating to amendments to particulars of objections before trial continue to apply?

The responses were that the practice should continue. One response added "but clipped in the way of Earth Closet/See v Scott Paine orders".

(26) In intellectual property claims does the approach to awarding indemnity costs where a claimant is required to prove matters unnecessarily, operate clearly and fairly?

Some responses were that it does not operate fairly as it is applied inconsistently or with a degree of hindsight which can make the rule unfair (whereas it is by no means always clear at the time of taking an action whether the matter was required to be proved unnecessarily). One response was that the approach referred to is rarely used or only used in larger patent actions. One response suggested that the issues-based approach to making costs orders is reasonably fair in this area of work.

(27) How best could costs be controlled in the Patents County Court?

Suggestions were: by a strong judge; capping the costs by reference to the value of the patent; by following Arnold J's proposal although there is a risk that front loading could become so extreme that cases become hugely expensive.

(28) Do the usual rules as to costs operate easily and fairly in revenue cases or are changes needed in any particular areas or types of case?

The rules operate fairly and do not need change.

(29) Is it right that the incidence of arrangements by which HM Revenue and Customs waive their rights to costs are haphazard and, if so, how could matters be improved?

The arrangements are not haphazard and do not require change save that matters might be improved by requiring and answer in advance.

(30) Do you have any suggestions for reducing costs by changes to the various procedural steps:

Our suggestions, based on responses to the questionnaire and discussion, are set out in the main body of this Response. Comments from individuals are set out in the summary of responses to the Chancery Bar Associations Questionnaire.

78. It is apparent that in the majority of cases practitioners feel personal liability for costs is fundamental to controlling costs and that changes that would alter this would not be beneficial to court users overall. The comments set out in Schedule III are of importance and give a clear insight into the views and experience of practitioners. Suggestions for alterations are identified above and in Schedule III. In broad summary:

(i) a possible alteration to some aspects of the approach to costs in contentious probate matters;

(ii) a shift towards Beddoe applications being on paper unless the Court otherwise directs having seen the application;

(iii) a suggested Practice Direction for boundary disputes (see paragraph 80 below);

(iv) a modification of the Court of Protection costs rule as per Schedule IV;

(v) a change in the approach to costs as regards trustees in bankruptcy, liquidators, receivers and administrators, the official receiver and the like through case management;

(vi) a change in the approach to indemnity costs in intellectual property cases.

79. We would happily participate in any further investigatory/consultation process and could identify experienced specialists who would contribute in their respective areas of expertise.

Boundary Disputes

80. The following suggestion was made by a leading Chancery Silk who specializes in easements, boundaries etc:

"There is only one rule which should be mandatory. Nobody shall be entitled to commence proceedings about the position of a boundary without first:

(a) (so far as the terrain permits) physically demarcating with numbered green pegs in the ground the position of the boundary contended for;

(b) taking numbered photographs of each of those pegs together with a plan showing the positions from which the photographs were taken;

(c) preparing a Surveyors' plan at a scale of not less than 1:500 depicting the boundary contended for as demarcated by the pegs. In case the pegs are removed, the plan once prepared must be of sufficient accuracy and at such a scale as permits the pegs to be reinstated in their original positions."

"If necessary there should be legislation authorising the would-be claimant to enter the land of the would-be defendant in order to take measurements, insert the pegs and to take photographs of them."

"No claimant in a boundary dispute should be allowed to recover any costs from the other party in respect of legal advice tendered prior to the taking of the steps detailed in paragraph 11 above."

"No defendant to a boundary dispute should be allowed to defend the claim or to recover any costs from the claimant (whatever the outcome of the dispute) until he has:

(i) (so far as the terrain permits) caused to be inserted in the ground numbered white pegs in the position on the boundary for which he contends;

(ii) photographed them; and

(iii) depicted their position on a Surveyors' 1:500 plan - preferably the same plan as mentioned in paragraph 11 above.

"Once the area in dispute has been so identified the Court should have power on the application of either party to restrict the amount of the costs recoverable by either party from the other to such sum as the court shall determine having regard to the value or apparent value of the disputed area Cf Jackson Initial Review at paragraph 6.6)."

81. It is suggested that a Rule or Practice Direction should give effect to this suggestion.

A Chancery Fast Track

82. The Preliminary Report asked if cases which currently fall within the specialist list with a value of less than £25,000 be allocated to a new Chancery Fast Track in the County Court List?

83. This Question was put to members of the Chancery Bar Association in its Questionnaire. There was about an equal split between those who thought the idea should be rejected and those who thought it might have possibilities. However, those who thought it might have possibilities expressed firm qualifications: few chancery cases concern merely money and, where money is involved, it is rarely an indication of complexity; in many areas of chancery work, determining a money value is difficult e.g. renewals of leases and possession claims of business premises under the Landlord and Tenant Act 1954; and, at District Judge level there is a general lack of chancery expertise.

84. Accordingly, if such a change were to be made, there could be no automatic allocation - the decision should turn on complexity, not value, and whether the particular Court has proper chancery experience. In addition, there must be a discretion to multi-track any case at any stage on the grounds of complexity. Substantial dissatisfaction was expressed about the inadequacy of chancery experience at District Judge level in particular and it is perhaps unrealistic to think that this could be changed without a

massive injection of funds into the legal system coupled with the appointment of many more (chancery experienced) judges across the Country. If these essential requirements were satisfied, a number of chancery cases could be tried on a Chancery Fast Track although it is doubtful that there are sufficient "straightforward" cases to warrant setting up a new procedural avenue. To allow for greater capture, the upper financial limit need not necessarily be confined to a maximum value of £25,000: a realistic upper limit might be £50,000. However, without specialist chancery judges, any such change is likely to be disastrous.

85. A more realistic approach (that nevertheless would require the appointment of many Chancery experienced judges) might be to introduce a Chancery Fast Track at District Registry level rather than in all County Courts. The legal system generally would benefit from having at least one District Judge in each District Registry with specialist chancery experience. However, even with a specialist Chancery District Registry District Judge, allocation must be based on complexity and not value.

The Indemnity Principle

86. While it might be tempting to some to get rid of the indemnity principle, such a step would be detrimental. It is evident from common experience (and as a matter of common sense) that the most effective control on costs is personal liability, or potential personal liability, for costs. This can only be achieved by the existence of the indemnity principle.

87. The indemnity principle has or should have a function as a "control" over costs – the facts that someone is legally liable to pay the costs gives some prospect of the costs being controlled at a reasonable amount. As the courts have commented, notoriously in CFA/BTE/ATE insurance cases, costs and success fees appear to run out of control where the client has no real liability for costs.

88. The indemnity principle also has or should have a valuable function as a measure of judging what is a reasonable amount of costs – if there is a legal liability then there is some prospect that the receiving party would have kept costs to what someone in his position can afford and considers to be reasonable and proportionate in the context of the litigation.

89. Without the indemnity principle it would be possible to enter into retrospective retainers at more favourable rates when the outcome of the litigation was known and before the costs order is made e.g. after judgment is handed down when the costs orders follows later.

90. The indemnity principle only operates effectively as a control and measure of reasonable costs if compliance is required at the date when the costs are incurred. If a client does not have to be liable when the costs are incurred and can enter into a retrospective agreement on terms as to (i) actual liability or (ii) the amount of that liability, there is no control or measure.

91. The only real difficulty caused by the indemnity principle is the problem of compliance when there is funding from a third party e.g. a parent, friend or relative; employer; trade union; organisations such as the AA; insurers; professional funders etc. The law has resorted to a "legal fiction" to overcome the problem (often described as "as long as the client retains a primary liability however unlikely it is to be enforced ….). It would be better to clarify the indemnity principle. This can be done simply by restating the principle in terms that expressly recognize the reality of modern litigation funding: "a paying party cannot be ordered to pay a receiving party more by way of costs than the receiving party himself, <u>or someone on his behalf</u>, is legally liable to pay his solicitor" (words underlined added). It cannot require statutory intervention: there has been no challenge to the validity of abrogating the indemnity principle in relation to legal aid (done by regulations) or in relation to CFAs "lite" (done by the CPR – see 43.2(3)).

<u>Costs shifting</u>

92. Costs shifting should be retained as should the full costs discretion. Responses to us across the range of chancery litigation indicate that personal liability for costs is a vital factor in controlling costs.

<u>Contingency Fees</u>

93. The initial view was that contingency fees are so contrary to principle and would give rise to such conflict as not to merit serious consideration. Accordingly, this was not a question put to members of the Chancery Bar in the second Questionnaire.

94. The Chancery Bar Association retains a concern about the potential conflict, the extent to which damages might be reduced and about the fact that under contingency arrangements costs will be based on the compensation won for the client rather than on a fair and reasonable remuneration for work actually done. There is also a concern about the viability of such arrangements in low value claims, particularly when disbursements are substantial. All the problems identified in the Consultation Paper on Regulating Damages Based Agreements are matters of concern. On the assumption that all such problems will be addressed with appropriate consultation, we comment and make additional suggestions as set out below.

95. Conflict is a serious concern (as it is with CFAs). To reduce actual or perceived conflict, regulations should prohibit both counsel and the solicitors acting on contingency arrangements in the same case. It is probably sensible to regulate further to say that the lawyer who is not on a contingency fee has the say on whether or not an offer can be accepted.

96. Such arrangements will seriously disadvantage clients unless there is some degree of costs shifting: in addition to the contingency percentage, the client will have to pay disbursements (including experts and counsel) and these can be substantial. In low value cases the reduction in damages without costs shifting could wipe out the recovery (experience in employer cases supports this concern); in higher value cases, without costs shifting, there will also be a substantial reduction in damages to cover the contingency fee and disbursements (including counsel and experts).

97. Regulations should prescribe maximum percentages – possible graduated unless the lawyer can show reason to depart from the scale e.g. exceptional complexity. Regulations must prescribe that the client is given a bona fide pre-estimate of all sums that will be payable out of damages and is keep up to date with proper costs information throughout the duration of the case. Regulations should prescribe that, if a client is not kept properly advised about the level of costs not covered by the percentage, any increase above the estimate/updated costs information is payable by the lawyer out of the percentage.

98. There is no reason for having a fixed recoverable costs regime with, or just for contingency arrangements, as, for the reasons set out in relation to the proposal to create a fixed costs regime above the Fast Track, such a regime reduces the recovery from the party in the wrong and increases the burden on the party in the right. There can be no objection to shifting reasonable and proportionate costs – as there is no success fee uplifting the base costs, the issues that drove the "costs war" disappear under a contingency fee arrangement.

CLAF

99. Although the details need to be worked out carefully, the principle of a CLAF is welcomed as an alternative to CFAs.

100. The basic tenet that a successful claimant should make a contribution to the fund is supported but must be subject to exceptions for cases where the money award is calculated to provide subsistence (e.g. some personal injury and clinical negligence cases; inheritance act claims; no doubt, others). The question of whether "damages are sacrosanct" is considered below.

101. A contribution from a defendant based on damages recovered by a claimant is unprincipled and objectionable as is the idea that a defendant should contribute something more than the claimant's actual costs.

102. We have many suggestions to make regarding the administration and regulation of a CLAF but it seems to us that these are not of concern at this stage.

Are damages sacrosanct?

103. Claims management companies promoted and created the idea of "no cost" litigation as a marketing gambit to bring in work but it is not based on any principle of law that "damages are sacrosanct". What is plain is that damages needed to sustain life and for subsistence must be safeguarded. However, there is no principle in law that damages should not be used to pay costs: in fact CPR 43.2(3) and the concept of a CFA lite under which costs are payable out of "sums recovered" (which includes damages) recognizes this in terms.

Conditional fee agreements

104. CFAs are not widely used, at present, in chancery litigation. It is felt that CFAs are not suitable for high risk cases and that their best role is in funding high volume relatively straightforward litigation. Accordingly, there is not substantial CFA experience in chancery litigation. However, it does seem that there are increasing pressures to use CFAs and what experience does exist has given rise to strongly held views as will be apparent from the Questionnaire in Schedule III.

105. CFAs have provided access to justice. They have allowed claimants to take on powerful defendants accustomed to frightening off claimants by their ability to fund litigation. However, there are indications that the balance has tipped too far in favour of CFA claimants. Importantly, while most of the analysis of CFA litigation has been in the context of personal injury, clinical negligence and professional negligence claims involving substantial insurers, there are indications that CFAs are spreading to other areas of work where both parties are "ordinary litigants" not backed by an insurer. An ordinary claimant could face an ordinary defendant on a CFA with ATE insurance and vice versa. If insurers find it difficult to litigate in the face of an adverse costs risk close to three times base costs (base costs plus 100% success fee plus a premium for own-disbursements and adverse costs that is a significant proportion of the adverse costs liability) then ordinary litigants will find this even more daunting. CFAs provided claimants with access to justice but are now at a point where arguably they can have the effect of denying parties opposed by CFA funded litigants access to justice – insurers and ordinary litigants.

106. The CFA system causes concerns some of which are as follows:

(i) The most effective control over costs is some degree of client liability for own-costs. The CFA system removes any such constraint.

(ii) A material conflict of interest, or perception of conflict, arises when an offer is made to a CFA party (a global offer that does not separate out costs and damages; a split offer that is adequate on costs but light on damages and vice versa). The seriousness of this conflict cannot be overstated – it is expressed by all including senior barristers and City firms.

(iii) CFAs cause significant cash flow problems in big, long-running cases and, for sole practitioners, give rise to unacceptable levels of risk. These are the cases

that ordinary litigants have serious problems in funding yet these are the cases where CFAs are not acceptable to the lawyers. Even a discounted CFA can be too much for an ordinary litigant. Accordingly, CFAs do not provide access to justice across the board. Further, cash flow problems increase the degree of conflict when an offer is made.

107. If CFAs are retained, success fees should be payable by the client (which would operate not only as an effective control of success fees, but also as a control over base costs). Such a system operated perfectly satisfactorily under the CFA regime before the 1999 cost shifting changes. This is developed below.

108. Other changes to CFAs should be on the following lines:

(i) If success fees shift back to the party entering into the CFA, much of the "anger" about CFAs will disappear. However, if the success fee, or any part of the success fee, remains payable by the defendant, consideration ought to be given to having a fixed costs regime for CFAs so as to control the base costs.

(ii) Success fees should be set by reference to the risk in the particular case rather than on a global basis that takes account of all cases won or lost (see the dissenting speech of Lord Scott in Callary v Gray (No 1).

(iii) In discounted fee CFAs, the success fee should be confined to the element of the fee that is at risk. Allowing a success fee on fees that are not conditional or subject to any risk must be wrong and the relevant statutory provisions should be amended accordingly.

109. **CFA Conflict**: In areas of work such as personal injury practitioners might have grown accustomed to the problem of conflict but they have not solved it and the actual or perceived conflict in chancery/commercial work is much greater because the overall risk and uncertainty is much greater.

110. **ATE premiums**: The state of the authorities means that, as long as most ATE insurers follow more or less the same approach to calculating premiums, there can be no successful challenge to ATE premiums on an assessment – any insurer following the insurance industry norm is acting reasonably and the resulting premium is therefore "reasonable". In practical terms, paying parties have no basis on which to challenge the

amount of ATE premiums and cost judges are, in effect, powerless to reduce fees. There is no reason for insurers to "break ranks". If, however, the ATE premiums were irrecoverable, in whole or part, market forces would operate to drive down premiums.

111. Objection is taken in principle to the recovery of ATE premiums because the premium is not a true item of "legal costs" and only "legal costs" are recoverable in law. One cannot recover BTE premiums, interest on borrowing used to fund legal costs and the like. The statutory intervention that allowed the recovery of ATE premiums ignored a fundamental principle that continues to operate strictly in all other respects when seeking to recover costs. There should be no surprise at the strong objection that has been taken to the shifting of the burden of ATE premiums. Further, it is not accepted that the current form of ATE "premium" (not payable if the case is lost when the insurance is needed; payable only if the case is won when the insurance is not needed to pay adverse costs and then payable by the other side) constitutes a "premium" in law. It is recognized that the courts have accepted that ATE premiums are a premium recoverable at law but it is submitted that point needs to be revisited as a matter of principle.

112. **Success fees**: Under the present CFA regime, the CFA party has no interest in controlling and, in practice, does not control, costs. If success fees were borne in part or whole by the party entering into the CFA, that party would have reason to negotiate the success fee down to the lowest attainable level as that party would be paying all or some of the success fee – accordingly, shifting the burden back onto the CFA party would operate as a natural brake on success fees. The market would operate to establish the level. If CFAs are retained, shifting the burden of payment back onto the CFA party would open the way to lifting (or eliminating) the maximum uplift so, perhaps, making CFAs a more attractive option for funding higher risk chancery/commercial cases.

113. Further, shifting the burden of paying the success fee back onto the CFA party would give the CFA party reason to control hourly rates and the base costs because the higher the hourly rate and base costs, the greater the risk of non-recovery on assessment, leaving the CFA party to pay the difference to his own lawyers (in the case of an ordinary CFA).

114. In the case of a simplified CFA (CFA "lite") where the client's liability is limited to the sums recovered from the other side by way of costs i.e. the true "no-win no-fee" arrangement, if the burden of paying the success fee is on the CFA party, the client has reason to control "own-costs" for the reasons stated above; in addition, under such an arrangement the lawyers have reason to control "own-costs" because the client is not liable to them for the portion not recovered on assessment (or by agreement) – this should operate as a powerful disincentive to lawyers to incur excessive or unreasonable costs.

115. Thus a simple change to the burden of paying the success fee could strike at the heart of many of the actual or perceived problems of CFAs. If success fees were irrecoverable it would stifle some low value claims but this would be counterbalanced by taking away the incentive to run up risk free costs and would cut back on speculative and weak claims; generous and unjustified settlements are often the only realistic option for defendants given the adverse costs risks.

Detailed assessment

116. The following are put forward as changes to the detailed assessment regime that would be likely to make detailed assessments more effective:

117. Hourly rates: Revert to the old A+B approach. Nothing else allows a proper identification of overhead charges on the one hand and uplift/profit on the other hand. Convenient as the single rate approach might be in terms of information given to clients, it makes the task of a proper assessment of hourly rates impossible. Hourly rates have soared over a time of low inflation – why? Any efficient firm must know the A+B make up of their single rate when they tell a client what the hourly charge will be. They can continue to give the client a single rate but should be required to give the court the breakdown on assessment. If a firm does not know what proportion of his single rate represents overheads it suggests that the hourly rate does not reflect a reasonable cost.

118. Create a second test of proportionality: There was a time, before hourly charges came to dominate, when lawyers charges took into account "what the case can stand". Introduce a second proportionality test applied after assessing the reasonable and

(Lownds) proportionate sum. Applying this test at the end would be consistent with old (pre-CPR practice) when the costs judge would stand back and make an overall adjustment to the costs allowed. However, the old adjustment was relatively slight: the proposal is that there should be a new proportionality test allowing substantial adjustments to be made.

119. Costs assistance: It should become ordinary and invariable practice as part of a concept of "post trial case management" for the trial judge to make firm and clear indications about any matter relevant to costs (as suggested above). Trial judges perhaps do not appreciate how much their comments about cost points assist the process of assessment.

120. Disclosure on assessments: There should be disclosure of all retainer documents as a matter of course. This will stop unjustified and speculative allegations of breach of the indemnity principle. The solution to the problem of privilege is to specify by regulation that solicitors must have a retainer document that is confined to the contractual terms of the retainer. It is only advice about the case that could be privileged and such advice should not be in the contractual retainer letter – it should be set out separately. In addition, it should be necessary to disclose all costs estimates and costs information (and associated communications between client and solicitor) as a matter of course. Steps such as these will stop speculative Points of Dispute.

121. Rule 47.18: Make costs of the assessment at large. Rule 47.18 (which in effect means that the costs of a detailed assessment follow the costs order at trial unless there is reason to make a different order) operates as a licence to rack up unreasonable costs and means that the paying party has nothing to lose by taking every conceivable point of attack. Make the costs of a detailed assessment costs in the discretion of the costs judge – the prospect of having to "earn" the right to costs in accordance with ordinary principles will concentrate the minds of both sides, deterring extravagant claims and Points of Dispute as well as deterring argument and tactics that lack merit. With costs at large, costs could be awarded to a paying party who succeeds on some important preliminary issues; a receiving party might have its costs reduced or might be ordered to pay some costs to the paying party if the specific points of dispute result in a substantial reduction (the latter is important); indemnity costs might be ordered against a paying party who take bad points or fails substantially; no order as to costs might be

appropriate; costs order could reflect unreasonable conduct in the actual assessment proceedings (a receiving party ordered to pay the costs of an adjournment etc). Such a change will benefit the assessment process.

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SCHEDULE 1

A note on costs in the German legal system

by Adrian Jack, barrister & Rechtsanwalt

One of the areas Lord Justice Jackson may wish to investigate is the German model of costs. Under this, each case is given a value (Streitwert) and the legal fees are calculated by reference to a table, which generates a "unit of fee" (Gebühr).

Different stages of an action are given one Gebühr. Thus, the lawyer earns one Gebühr for taking the case on, advising and issuing proceedings and another for attending the oral proceedings. On appeal the lawyer can charge 1.3 Gebühren instead of just 1.0. A party who wins completely is entitled to costs from the other side on this statutory basis.

The process is not quite as completely mathematical as this brief overview suggests, but it is still the case that civil costs of a case (even if it goes through three instances to the BGH, the Federal Supreme Court) are readily foreseeable.

There are a number of reasons why this is not a suitable model for the English legal system. Firstly, it is generally accepted that the scale of fees (which converts the Streitwert into a Gebühr) has fallen behind inflation and the earnings of lawyers generally. Yet the political reality is that it is difficult to ensure that the scale is kept up-to-date.

Secondly, by reason of the foregoing, it is increasing common for lawyers to agree hourly rates with clients, instead of charging the statutory scale fee. The effect is that parties, even if they win, are out of pocket. There is to my mind little doubt that this would be the result in England.

Thirdly, again a result of the previous considerations, civil litigation is the "poor relation" in the German legal system. Oddly criminal advocacy is very much better paid than civil litigation (partly because so many of the middle and upper classes are charged with tax fraud!)

Fourthly, the system works because civil lawyers do not have to do very much, compared to English solicitors. There is no discovery (at least in the English understanding of the process). The documents are attached to the statements of case. Any witnesses are called by the judge, who also examines them. The lawyers can ask supplemental questions, but there is no cross-examination in the English sense. There is no oral argument: the judge is expected to research the law himself.

Just minor matters show what a complete culture shock it would be for the German system to be imported into England: there are no bundles. The judge works off the Court file in which every document is numbered. (The parties are entitled to and do copy the Court file, when they need to.)

Lastly, could the English legal system cope with cheaper litigation? The German approach is very much pile it high, sell it cheap. English litigation is expensive and therefore more infrequent.

The following extract is taken from my book, *English Law and Standard Terms* (Lexxion, 2006), which endeavours to explain the English law on standard terms to a German market. The passage dealing with the amount of litigation is as follows.

(Note that the figure of 1,443,584 actions commenced in the Amtsgericht does not include the Mahnverfahren, which a simple procedure (somewhat similar to issuing a statutory demand). There are probably about 5 *million* of these issued a year in Germany!)

"These figures need to be compared with the position in Germany, looking first at the number of cases issues in particular courts.[5]

	England & Wales	Germany
County Court/Amtsgericht	1,395,754	1,443,584
High Court/Landgericht	24,083	412,924
Court of Appeal/Oberlandesgericht	981	56,645
House of Lords[6]/Bundesgerichtshof	192	4,595

Table 1: Cases commenced at first instance and on appeal in England and Wales and in Germany 2002 and 2003

The German figures do not include claims issued by a special debt collection procedure called the Mahnverfahren. This procedure allows a judgment to be obtained for debts which it is anticipated will be undisputed. If the debt is disputed, then the plaintiff has to proceed by the ordinary procedure.

[5] The figures for England and Wales are from Judicial Statistics. The first three figures for Germany come from Statistisches Bundesamt, Geschäftsentwichlungen bei Gerichten und Staatsanwalten seit 1998 (Stand 23.1.2004); the last figure from Bundesgerichtshof Tätigkeitsbericht 2003. This includes Nichtzulassungsbeschwerden (complaints that a Court of Appeal refused to grant permission to appeal to the Bundesgerichtshof: Zivilprozeßordnung § 544). 2002 was a transitional year in the Bundesgerichtshof in consequence of the ZPO-Reformgesetz of 27.7.2001 and lead to a one-off increase in work. The figure for 2003 was 3,888.

[6] Petitions for leave to appeal lodged in civil matters on appeal from England and Wales: Judicial Statistics 2002 table 1.3

Comparing the number of trials, the position based on statistics from the first half of the 1990's is as follows:[7]

	England & Wales 1994	Germany Average 1991-1993
Plaints (including Mahnverfahren)	2,658,416	c.7,000,000
(Per 1,000 residents)	54.0	117.0
Plaints contested by Defendant	112,104	841,778
(Per 1,000 residents)	2.2	14.0
Disposal by judicial decision	90,314	515,947
(Per 1,000 residents)	1.8	8.6

Table 2: Cases contested and disposed of judicially (a) in England and Wales in 1994 and (b) in Germany taking the mean average over 1991-1993

[7] Table adapted from Dannemann, "Access to Justice: an Anglo-German Comparison" (1998) 2 European Public Law 271-292. Some rounding errors have occurred.

SCHEDULE II

A further note on costs in the German legal system
by Adrian Jack, barrister & Rechtsanwalt

This further note on German costs law is prepared at the request of the Chancery Bar Association and should be read with my initial note of January 2009.

Chapter 55 of Lord Justice Jackson's Preliminary Report gives an overview of the German system of costs and is generally accurate. (The precise figures for fees based on the statutory scales depend on the assumptions made, but are broadly representative.)

There are a number of points which chapter 55 does not sufficiently recognise and which in my view make the adoption of a German scale costs regime inappropriate in England.

The first is a point about the burden and standard of proof. The standard of proof in German civil cases is in essence the same as the English *criminal* standard of proof. In other words where there is a dispute of fact the court must be *sure* that the party on whom the burden of proving the disputed fact has established that fact. One effect is that the incidence of the burden of proof is much more important than in England. The other effect is that witness evidence becomes in practice less important than evidence which is less easily contested, such as documents or expert reports. Further the parties themselves cannot give evidence *as witnesses*.

The consequence is that trials are generally much less about the credibility of competing witnesses, so that much less time is needed to be devoted to such evidence. Lawyers for parties will try and base their claim on less controversial material.

If a witness is called, it is unusual for a lawyer to have taken a proof from the witness. This is because of the risk of tampering with the witness's evidence.

The second point is that cross-examination in the English sense is not permitted. A witness will be examined on the point for which they called as a witness (i.e. not generally on the case at large) by the judge. The lawyers may ask some supplemental questions, but the examination of witnesses is generally very short.

The consequence of these two points is that time spent in court is generally very short (although it is often spread over a number of different, sometimes widely spaced, days). In England by contrast trials can be very much longer and there is no "standard" length. A scale system necessarily works on the basis that there is some comparability between cases of similar value. This simply does not exist in England.

The third point concerns disclosure. Because there is no disclosure in the German system, this is not a variable between cases of similar value. In England, of course, the amount of disclosure can be enormously different, both between cases of similar value and between Claimant's disclosure and Defendant's disclosure in the same case. The result is that any single scale of costs for disclosure would be a hopelessly blunt instrument.

The fourth point concerns cross-subsidisation. Originally when the scale fee was introduced (in, I think, 1870), this was a valid argument. At that time, lawyers were only admitted to their local court, so that in a small town there might be only a handful of firms. Firms covering more than one court were not permitted. (Germany has and has always had a decentralised legal system with some 108 High Courts.) There was thus an oligopoly in individual towns of a number of small firms. If a big case came to be litigated before that court, then one of the small firms would act for each party. It was thus perfectly realistic for a small town lawyer to expect to pick up cases for, say, Siemens or BMW.

In the last twenty years, all this has gone. Lawyers are now permitted to practice before any Court in Germany (with the exception of the Federal Supreme Court, which still has a separate bar). Firms can have offices wherever they want, so there are now big cross-German firms. Naturally these firms are the ones which have the big corporate clients and handle the big cases, usually on an hourly basis.

At the same time at the bottom end of the lawyering market, there has been a marked change. In 2000, when I was admitted as a Rechtsanwalt, there were about 100,000 Rechtsanwälte. There are currently more than 155,000. This massive increase is caused by the number of students emerging from university having studied law. Many of these proceed to doing the two year traineeship (known as the Referendariat). The Referendariat is paid by the state and (by reason of the Federal Constitutional Court's interpretation of the Grundgesetz, the German basic law) a student having passed the first state examination has a *right* to a place as a Referendar.

After finishing the Referendariat, trainees who pass the second state examination have the *right* to be admitted as a Rechtsanwalt and to practice. (There is no three year restriction on setting oneself up on one's own account.) Due to the favourable social security arrangements for Rechtsanwälte, many do so, even if they have little prospect of establishing a practice for themselves. They often do other jobs (often as in-house lawyers, but even things like driving taxis). Their legal practice is a hobby. ("Hobbyanwalt" is a recognised word!) The result is that there are hobby-lawyers who will do small claims, which any commercially orientated firm would refuse to touch.

It can be seen that there is a marked differentiation: big firms doing big cases at hourly rates, one-man hobby-lawyers doing tiny cases at the statutory rates and in the middle firms squeezed by the failure of the statutory scales to keep up with inflation and wage inflation. Cross-subsidisation is effectively dead in Germany.

To summarise, German scale rates are inappropriate for England:

- Lawyers do much less in Germany than in England.
- The amount of work which lawyers need to do on cases of comparable value is much more variable in England than in Germany, because there is no disclosure and trials are much shorter. The costs of cases of comparable value are much more comparable in Germany than in England.
- Cross-subsidisation of low value claims by high value claims, which was the rationale of the German system, has effectively ended in Germany and cannot sensibly be introduced in England.

SCHEDULE III

Summary of Responses to the Chancery Bar Association Questionnaires

Two Questionnaires were sent to members of the Chancery Bar Association. The responses are summarised below. Questions relating to various "generic" issues were asked; then there were questions about specific issues of chancery litigation. 47 responses were received. No single question was answered by everyone and no one answered all questions.

1. <u>Are CFAs in their present form satisfactory?</u>

Yes = 18; No = 6

The experience is that CFAs with success fees/ATE premiums:

(i) give rise to an imbalanced costs risk that places undue, and unfair pressure, to settle even when there is merit in opposing the claim;

(ii) make it more difficult to settle a case because CFA lawyers are concerned to cover their own interests and because insurers want the ATE premium covered;

(iii) give rise to an unacceptable conflict, or perception of conflict;

(iv) increase costs excessively.

In chancery work, at present, CFAs are probably seen most often in contentious probate work where they are considered to encourage speculative or "coin twist" claims that result in a payment because of the costs risk/pressure.

It is apparent that the costs risk/pressure created by CFAs is "real" not only for "ordinary" litigants but also for trustees, personal representatives and commercial organisations in large money sum cases. CFAs are viewed as "an instrument of intimidation and oppression" and CFAs are "blackmail for wealthier clients"

The general view is that CFAs are not suitable for chancery/commercial cases which are varied in nature and carry high risk. CFAs work best in relatively straightforward litigation of a repeat nature where liability is not a serious (if any) risk and the litigation is not so protracted as to cause cash flow difficulties (as would be the case for much medium to top end chancery/commercial work).It is necessary to have a large number of

CFA cases to spread the risk and chancery/commercial practitioners are unlikely to establish large CFA practices.

While CFAs, in theory anyway, can give access to justice to some who would otherwise be deterred from litigating by the costs risks, the general chancery is that, although there are many speculative claims, on the whole lawyers are only willing to act on CFAs in cases that have substantial merit which means that the extent of "access to justice" that CFAs provide is not as great as might be thought – complicated cases with merit and/or cases that involve novel points of law or that, in general terms, have an appreciable "risk factor" (as is the case with chancery/commercial work generally) are unlikely to obtain CFA funding.

2. What changes should be made to maximum success fee uplifts?

3. Should success fees and ATE premiums continue to be recoverable from the other side?

While some responses made the point that a success fee of more than 100% should be allowed in view of the risk inherent in chancery/commercial work, the majority expressed the view that the maximum success fee should be reduced and that the burden of success fees/ATE premiums should fall on the party entering into these arrangements or should, at least, be shared.

ATE premiums are seen as excessively high. In high value litigation, ATE premiums can be in the range of 65%-75% of the amount of adverse costs covered i.e. £650,000-£750,000 for every £1m of adverse costs incurred.

Suggestions covered a wide range including: a better alternative would be a damages based contingency arrangement; success fees should be recoverable but not ATE premiums; restrict the proportion of the success fee that is recoverable from the other side to, say, 50% of the (reasonable assessed) success fee but allowing a higher proportion if costs have been increased by the conduct of the paying party; limit the success fee to, say, 50% unless extra costs are caused by the conduct of other side.

4. <u>Should mandatory protocols be replaced by a culture of sensible pre-action correspondence</u>?

Yes = 21; No = 9

Mandatory protocols are generally considered to achieve little but add to the costs unnecessarily; they front load costs; they give rise to time (and costs) wasted arguing about compliance and because the timetable can be too long; costs are incurred scoring points alleging non-compliance when the ability to respond not affected - where a defendant has a defence the absence of such a letter or the failure to comply strictly with the protocol makes little difference; they lead to extensive satellite litigation about compliance particularly when a defendant has a weak case and wishes to be obstructive.

The general view is that what is needed is a culture where the LBA gives enough information for the recipient to give serious consideration to the claim with a right to ask for further information if necessary. A LBA should be enough as was the pre-CPR practice reinforced by simple and sensible practice directions and/or a stronger and sensible view on costs e.g. in the absence of such a letter costs can be disallowed in a case where the defendant submits; if matters are compromised as a result of the exchange of protocol letters there could be no order as to costs.

A contrary view was expressed pithily: if there was such a culture or if it could be created, there would have been no need for protocols in the first place.

Those in favour commented: some protocols add to costs but they have benefits and could be extended to specialist chancery areas such as contested probate and family provision claims; make them advisory not mandatory; flexibility is needed in their application and the court's response to non-compliance; judges should be prepared to accept sensible pre-action correspondence as an adequate alternative to mandatory protocols where there is no evidence that the protocol would have made any difference; supplement with a culture of sensible pre-action correspondence which could include not applying the formal protocol by agreement; parties should be required to produce proportionate access to documents and reasoned responses during the protocol process

Some considered that a general Chancery protocol would be a good idea – it might add to costs initially but should save costs later because marginal points were not litigated;

one respondent thought a property protocol would be a good idea, even though it would increase costs at an early stage, as it would force parties to consult experts and get all evidence, including documents, together before commencing litigation - the view was that protocols do not add to costs but frontload costs.

5. Should costs capping be used at all?
Should it be retained, as now, in exceptional cases or extended to all cases large and small?

Yes = 8; No = 25

The majority view was that cost capping should be retained for exceptional cases only. In essence, the points and comments made when expressing concerns about a fixed recoverable cost regime apply to cost capping: caps will lead to sub-standard preparation; at all levels, there is a real risk that reasonable costs will be incurred but will be irrecoverable; there is a risk of satellite litigation.

Interesting points were made: it is very difficult to be fair in anything out of the ordinary and in ordinary cases costs are predictable so a cap should not be necessary and vice versa; parties who think they will lose will try to get a cap or a Fast Track allocation; give court a discretion to cap where thought appropriate; should not be retained save in public interest cases

Here and elsewhere the view was expressed that better control would be achieved by having stronger post-event assessments.

Those in favour of cost capping commented: if CFAs are not reigned in, cost capping might need to be extended; extend to all but the most valuable disputes (say £15m or more) or most complicated; should be the norm imposed at CMC; provided costs are not as front loaded as at present; until a better way comes up – extend but not necessarily to all; can be of benefit by focusing on the things that really matter rather than on the recovery of costs – sometimes cases are pursued to recover costs irrespective of the underlying issues; capping should be extended to all purely money disputes; the claimant's costs should not exceed the sum finally awarded, the defendant's should not exceed the amount claimed.

6. **<u>In his Preliminary Report Jackson LJ is minded to extend the Fast Track fixed cost regime to all work cases in all Fast Track cases up to £25,000. Do you agree with this?</u>**

Yes = 4 (qualified by comments about the need for flexibility to allow for complexity); No = 14

The fundamental point most often made in the responses was that value does not determine complexity or indicate the work involved as is set out in the main body of this Response.

There is a difficult balance between fixed cost regimes which can lead to sloppy preparation because inadequate time is allowed (happening with much high volume, low cost solicitors work) and cases which seem to be regarded as a licence to print money. Flexibility is needed to balance value and complexity; the degree of complexity is not always obvious at outset but, in contrast, any flexing might need to happen at an early stage so the client can withdraw if necessary.

The regime should allow the court discretion to multi-track any case at any stage if substantial complexity is or becomes apparent.

One response urged caution say a fixed cost regime will further remove the courts from dispute resolution – parties with valid claims will be deterred from issuing and “this will drive the wedge between judges and practitioners even deeper”.

One suggestion was for a graduated scale reflecting the sum involved on the basis that it is dangerous to make scales depend on complexity as this is subjective.

7. **<u>In his Preliminary Report Jackson LJ is minded to introduce a system of fixed recoverable fees for all commercial/business cases in the range of £25,000 - £500,000. Do you agree that such a regime should be introduced?</u>**

Yes = 3; No = 18 (many of those who responded to this question made no response to the preceding question and vice versa).

Comments included: it would be swings and roundabouts as is the case with CFAs penalising some to benefit others; it would be invidious and would be used tactically (forcing a party to incur substantial irrecoverable costs); even if not used tactically, there would be no scope for fair costs recovery by either party in anything of importance or complexity; will play into hands of unscrupulous litigants; assessment is the remedy; likely to lead to injustice by under or over payment in anything other than straightforward cases; it is better to let the market decide what fees are reasonable for any particular case.

A number of people commented expressly on the suggested range to which the regime would apply: if done, the cut-off should be closer to £200,000; £25,000-£100,000 would be a reasonable threshhold; these bands would cover disputes of real significance to the parties; the range should be much higher than £500,000.

Two responses favoured capping over fixed fees: if recoverable costs were to be limited to less than standard reasonable costs, this should be done by way of a judge imposing a cap rather than by a fixed costs regime; cost capping imposed at the CMC stage is preferable.

Those in favour of a fixed costs regime qualified their support: yes with an exception for cases of great complexity and as long as the rates are sensible which includes allowing for payment of overheads; yes principle but the amount of work required to do a competent job varies enormously – the regime/scales must take that into account; in principle this could be beneficial but has difficulties in application to non-money claims and claims where the money element is not reflective of the commercial value of the claim as in many areas of chancery litigation; asking the parties to value e.g. injunctive relief, engenders a great deal of arbitrariness in itself; depends on the level of fixed fees – if too low it will deter solicitors with a view to profitability from doing necessary work.

8. **As a matter of principle do you support the concept of a (privately funded and operated) Contingent Legal Aid Fund (as an alternative to CFAs) available to means and merits tested litigants?**

Yes = 20; No = 6

A view frequently expressed (orally and generally, not necessarily in the responses) is that CFAs, CLAFs are only considerations in the (deplored) absence of a properly funded and controlled legal aid scheme. Lack of client liability for any costs, lack of costs control, and costs protection for legally aided parties in the past are all matters that are criticised in general conversation on topics such as this. In the main body of its Response, the Chancery Bar Associations makes several suggestions as to how a CLAF should operate: all these suggestions would apply to a renewed (and improved) legal aid scheme.

One response stated opposition "unless the CLAF is liable for the costs when the CLAF litigant loses".

9. <u>As a principle, would you support funding a CLAF by successful CLAF claimants paying a percentage of damages (as small as possible say 5%) back into the fund?</u>

Yes = 22; No = 4

The point was made that damages/compensation needed to sustain life should be protected. Other comments included: any deduction should be a matter for the competing schemes and users to negotiate. The issues of what would be done about non-money claims needs to be addressed.

10. <u>As a principle would you support funding a CLAF by the unsuccessful defendant paying a percentage over and above the claimant's actual costs into the fund?</u>

Yes = 5; N = 22

Even where a response expressed had no view either way about a CLAF, there was opposition to the idea of a defendant having to pay more than actual costs.

Support was qualified e.g. possibly but would have to be a small percentage; assuming a low percentage it is an improvement on the present success fees and ATE premiums.

11. <u>Can anything to done to encourage early settlement of probate claims?</u>

There were many responses to this question and the suggestion included the following:

(i) Sensible pre-action correspondence (possibly there is room for a specific protocol) followed by early (mandatory) mediation or something similar to the

Family Division FDR subject to a discretion where e.g. the issues are too stark and the parties too "at odds" to settle (in the Family Division FDR can be dispensed with where it is clear the parties cannot or will not settle).

(ii) Greater encouragement to solicitors to respond appropriately and fully when asked about the making of a Will.

(iii) Early disclosure of hospital records and expert reports (medical and handwriting) as is done by responsible litigants.

(iv) Codify the cost principles and abolish the possibility that if the litigation is the deceased's fault the loser might not have to pay costs and might even get costs out of the estate – this will enable clear costs advice to be given at the outset.

Pertinent comments were made:

(i) Re Kostic should perhaps be reigned in: the rules ought to reflect the fact that in probate claims costs might not always follow the event but make it clear that it will only be in exceptional cases that the costs order will be different – otherwise people will not expect to face the normal costs risk in probate cases and this will not encourage settlement.

(ii) The all or nothing nature of some probate issues does not prevent Part 36 having an effect: see Ritchie [2009] WTLR 885

(iii) Probate claims do generally settle early when solicitors experienced in this area are involved; problems arise in small firms where not much probate is done or when a litigator becomes involved – the parties then take up positions from which it is difficult to move them

(iv) FDR sounds good in principle but will add a layer of costs. Very few probate cases and Inheritance Act cases reach court and if they do it is usually because of some factor which makes it impossible to settle (the personalities of the parties being the most common) so FDR might not achieve anything.

(v) It is necessary to know something about the case before advising settlement.

(vi) Two responses said that the *Larke v Nugus* practice regarding disclosure works well.

(vii) Practitioners try pretty hard to get parties to talk early; it is impossible to eliminate the hopelessly misguided and obsessed non-beneficiary from these disputes

12. Should the special cost rules and guidelines which apply to contested probate claims under CPR 57 continue?

Yes = 13; No = 1

Comments were:

(i) 57.7(5) should apply to claimants in a claim for revocation of a grant in common form.

(ii) Disapply Part 36 in probate claims – there is no substantive difference between C & D; pure chance who issues first and these cases are all or nothing. Otherwise, the special rules are justified where the dispute does not turn on facts in own knowledge or on something you have done – this type of litigation is not like ordinary litigation: often one party has no choice but to be involved and has done nothing to give rise to the dispute. Recent cases law improves matters as the onus is on the losing party to show why costs should not follow the event.

In addition, the Preliminary Report makes a mistake at paragraph 3.2 which does not state the conventions as to costs of probate actions correctly – where there are reasonable grounds for opposing the Will but the losing party is not awarded costs out of the estate, he is not ordered to pay costs see Williams Mortimer and Sunnucks on Executors, Administrators and Probate 40-06 and Re Kostic.

One "yes" response was qualified: subject to a protocol process

13. Should there continue to be a departure from the general CPR 44.3 costs rule for appeals to the Court of Appeal in probate proceedings?

Yes = 7; No = 9

No comments were added by anyone

14. Should the costs neutral regime (costs come out fund) be extended to all parties in all trust/estate cases?

Yes = 3 (qualified); N = 20

The general view was that if parties wish to engage in adversarial litigation they should be prepared to bear the costs even though this is hard for beneficiaries with a good case who cannot get legal aid; potential costs liability is a salutary deterrent to trustees and beneficiaries alike.

Comments included the following:

(i) potential costs liability is a salutary deterrent to trustees and beneficiaries alike on balance, more litigation is likely if there were a costs-neutral regime and/or it would encourage parties to join in, extravagance and discourage settlement;

(ii) beneficiaries who were not parties to the litigation would suffer because the fund would be reduced under a costs-neutral regime;

(ii) it might operate unfairly where there is a small estate – claimants with meritorious claim would be disadvantaged; often it means that the successful party pays for the litigation.

Those in support qualified their position as follows:

(i) Not as a general rule but where both parties have behaved reasonably when prospective costs orders to this effect should be readily available.

(ii) It should depend on whether/what reasonable steps have been taken by e.g. those acting for unascertained beneficiaries.

(iii) Not in all cases – there might be a case for extending it somewhat

15. <u>Should only 'proportionate' costs come out of the estate with all costs above the proportionate limit being borne by the party incurring them (or by the losing party)?</u>

Yes = 7 (in many cases qualified); No = 10

Those who indicated clear support for the proposal split equally on the issue of who should pay the balance: balance paid by the disproportionate spender; balance paid by loser.

Support was qualified in different ways:

(i) Yes provided proportionality means proportionate to the complexity of issues and not just the value of the estate.

(ii) Proportionality must bear in mind the value of the estate but any cap has risks – the cap might be reached before the case is complete leaving a litigant to bear own costs which is unfair when there is a meritorious claim; could be a barrier to having legal representation at trial.

(iii) Only in cases of a contentious nature; many trust applications are not really hostile and indemnity costs for all parties is often fair and reasonable.

(iv) A proportionate limit would be worth considering but should be quite low and on a sliding scale – say 10% of fund up to first £200,000 and lower rates proportionate to the excess over that limit.

(v) Not in the case of trustees acting reasonably

Comments against the proposal included the following:

(i) It is unnecessary to change anything – if the estate exhausted it is usually because one party has acted unreasonably; have the usual rules in hostile litigation; in non-hostile litigation it can be difficult to say one or other is the winner or loser.

(ii) The importance of the issue often exceeds the money value.

(iii) Cannot see how proportionate can be defined in this context.

(iv) The reasonableness test should be sufficient.

(v) Some disincentive to reckless incurring of costs is needed.

(vi) There should be inter partes orders following the event save in certain circumstances e.g. Re Kostic.

16. Should such a cap be based on a percentage of the value of the estate rather than the current cost capping practice of looking at the 'reasonable costs' of litigating all issues?

Yes = 2 (one qualified); No = 12

The qualification in support was: a cap might be appropriate in small cases but not for large estates/trusts

Other comments made included the following:

(i) Reasonableness should be the test (and is the only fair test)

(ii) Too broad brush and would lead to injustice

(iii) Capping in any form brings the risk that the cap is reached before the case is complete so the litigant has to bear his own costs of the excess which is unfair where the claim has merit, might deter if not prevent proper representation.

17. Should a costs neutral regime (all costs out fund) be extended to Inheritance Act claims?

Y = 3 (qualified); N = 15

Qualifications of support were as follows:

(i) This should not be the starting point as this litigation is usually hostile. Adopt the probate approach i.e. costs follow the event unless reason to depart from this rule.

(ii) Not as a starting point but where the parties have behaved reasonably with prospective costs orders to this effect readily available.

(iii) Some form of capping is needed: astonishing amount of costs incurred in absolute terms and in proportion to the amount of the fund with costs increased by practitioners and judges with no experience in the area.

Comments in opposition to the proposal included the following:

(i) potential liability is a deterrent to both sides;

(ii) the winner needs to be protected;

(iii) the proposal is too wide - perhaps in some cases (not identified);

(iv) costs should follow the event save where the circumstances warrant or the testator has caused the litigation e.g. re Kostic;

(v) the proposal would encourage fighting to the bitter end and eliminate pressure to settlement by making Part 36 offers.

One response suggested that there might be a case for applying the second of the special probate rules to Inheritance claims i.e. an unsuccessful applicant should not be ordered to pay costs if there was merit in the application; in practice this may not matter much because, if an application has merit, a Part 36 offer is usually made; however, if the special rule applied, obdurate beneficiaries might be encouraged to make offers.

18. Are Beddoe applications too often made out of abundance of caution?

Yes = 10; No = 12

A narrow majority of responses thought Beddoe applications were not made too readily. The responses showed that here are those who feel they are able to judge easily when a Beddoe application should or should not be made and they support the view that Beddoe applications are made too easily. Others, including leading Chancery specialists, take a more cautious view. This is plainly an issue on which the Judges and practitioners need to work together to find a procedure that permits firm and confident advice to be given. See also the response below about paper applications.

About half of those who felt Beddoe applications were made too easily qualified their views by adding the comment – "but why not" or "understandably". This reflected the view of some who felt that Beddoe applications were not made too readily: "the costs consequences of not applying can be horrific and challenges can be made years after the event (up to 6 years after a small child becomes 18)"; if an application is not made, counsel for the trustee lives in fear for the duration of the action; absence of a Beddoe might be a point taken by the other side.

Comments of those who felt Beddoe applications were made too readily included: particularly by some City firms; in cases where the beneficiaries are adults and should be able to agree to costs coming out the fund; often with indiscriminate disclosure increasing costs.

It was suggested that there should be greater clarity in the commentary to the CPR about when such applications are and are not necessary; applications are often made where there is no need or it is obvious that they are going to fail.

One radical suggestion was that there should be a presumption that executors and trustees are acting in the interests of the estate/trust and only liable for costs where it is clear there is personal or other reason for so doing

19. Could more Beddoe applications be dealt with on paper?

Yes = 17; No = 1

The overwhelming majority of responses thought that more applications should be on paper. It is considered that the basic rule should be that all Beddoe applications should be on paper save in exceptional cases where the Court requests a hearing having read the papers but that the point might best be answered by the Chancery Masters.

Suggestions included depriving applicants of costs in applications that are obvious or where unnecessary amounts of documents are lodged in support of the application; the Court should give more guidance as to when the court would look favourably on a paper application as there appears to be no consensus among Chancery Masters/District Judges in Chancery Registries about this.

20. Should a special form of costs capping order be developed for neighbour disputes (boundary disputes) for example limiting recoverable costs to 50% of the value of the rights in issue or at a fixed sum of say £15,000?

Yes = 7; No = 16

One specialist practitioner responded: Boundary disputes are not always between individuals and can be between small development companies. Sometimes emotions drive up costs but this should not be assumed always to be the case. Resolution of these disputes often involves complex questions of fact which are not in the knowledge of the parties or even readily ascertainable without considerable research e.g. a claim to a prescriptive right will typically involve an exploration of the nature and ownership of the way and its use over many decades; layered upon that factual difficulty area usually some difficult questions of law with the consequence that it is often difficult to give reliable advice about the merits until substantial costs have been incurred. Mediation at an early stage is difficult as parties do not have a full picture; by the time they do have the full picture costs can be so high that settlement is difficult – costs can be so high that this fact causes stress and anxiety which contribute to entrenched attitudes.

A specialist silk responded: These cases are often factually and legally complicated but judges behave as if the fact that the dispute involves a boundary puts both parties under an obligation to settle which is unjust. Every legal adviser should ask his client at an early stage: "5 years from now will you be glad that you spent a lot of money to establish the principle even if, for whatever reason, you end up losing?" A client who

answers “no” cannot complain if he nevertheless goes ahead. But pressure should not be put on people to settle. Requirements for mediation and pre-action protocols merely add to the expense.

The importance of the matter to the parties can lead to disproportionate costs but the courts can use costs orders to encourage reasonable and proportionate behaviour i.e. deprive an unreasonable party of costs or allow a reasonable party adverse costs. However, it is wrong to visit the unreasonable behaviour of one on the other by a mutual cap. Boundary disputes can have very important consequences for the litigants even if a small piece of land is involved. It is wrong to assume that these cases are trivial. These claims can be complicated and hence expensive. These disputes can necessitate lawyers having to trawl through past documents and events; often the relevant facts and events took place long in the past and are not known to the litigants and have to be established painstakingly by lawyers – it is not only emotion that drives up costs.

One party is often dragged in unwillingly and despite making sensible offers is unable to resolve the litigation leaving them no option but to proceed – why should they end up out of pocket if they succeed?

A cap based on the value of the rights in issue would lead to disputes about the value of the rights.

Liability for costs encourages settlement; compulsory mediation should be built into the rules; cap only in an exceptional case.

A cap might be appropriate where the value of rights is low (especially residence cases) but a cap linked to a percentage of the value would be unrealistic: any cap would have to be a fixed sum with flexibility for complex cases or unreasonable behaviour. In high value cases – no cap can be justified.

Trying to reduce costs will simply require the lawyers to do the same work for less money; lawyers are not paid particularly well for this type of work as matters stand.

The solution is proper case management coupled with the ordinary assessment process – this should ensure that only reasonable costs are recovered: judges can take conduct into account when making the costs order.

Make both parties pay on account into a common fund which goes to the winner with the loser bearing own costs; solicitors and counsel's rates should be capped at a reasonable level strictly enforced.

21. <u>What are the main cost centres in such disputes and can anything be done to reduce costs without ignoring the importance of matters to the litigants?</u>

Virtually every aspect of boundary dispute litigation was mentioned at some point as a costs centre: investigations into title; experts, witnesses and trial; solicitors work on documents; unreasonable behaviour and the personalities of litigants; solicitors unfamiliar with the law; solicitors' letters about ongoing disputes and issues; counsel, solicitor and expert consulting each other; need for each of counsel, solicitor and expert to listen to client's narrative; client's need for attention; endless correspondence between solicitors; applications for injunctions, alleged breaches of injunctions and general whinging; often at least one of the parties is wholly unreasonable (and the other party understandably ends up the same) determined to get their own way and the last thing they think of is costs. A lot of costs are incurred at a relatively early stage before the issues are properly identified.

However, the point made in relation to the preceding question was repeated, namely, that often background matters need to be addressed by expert and factual evidence; documentary investigations can necessarily and unavoidably be extensive.

It was suggested that costs could be reduced by having judges who know something about conveyancing and the patience to try the dispute. Another suggestion was to have proper case management (specialist District Judges overseeing a case to trial would reduce time and costs coming to trial)with encouragement to mediate or compulsory mediation. A further suggestion was a compulsory and early joint meeting of experts. Two responses favoured a specific protocol on the ground that if it frontloads costs, it might concentrate minds

It would help if all parties had access to a computer which could put all plans onto the same scale and superimpose them if necessary.

Unless the land exceeds a certain value, such disputes should be dealt with by a surveyor on the same basis as party wall disputes.

22. Should there be a cap on recoverable costs for minority shareholder petitions?

Yes = 4; No = 12

Many of those in favour of a cap were not deterred by the fact that value might be in issues and/or that value did not necessarily reflect complexity commenting inter alia: there is real force in this suggestion; the cap should reflect the amount in dispute which would require a robust approach where the amount in dispute is contentious; restrict the mass of complaints produced to bolster a case of unfair prejudice which take an inordinate time and expense to resolve (i.e. active case management by the Court); limiting costs to the amount at stake could have a sobering affect and prevent emotion getting the better of reason.

However, some qualified their support saying inter alia: if limited to the amount in issue it would disadvantage minority shareholders whose rights can only be protected by a detailed examination of the facts and the consequences; there should be exceptions to a capping rule where very high value and complexity is involved.

The majority were against a cap commenting inter alia:

(i) Cap in exceptional cases only; "completely impractical"; the current power to disallow unreasonable costs and costs of unreasonable issues is sufficient.

(ii) A cap would distort the bargaining position of the parties – a defendant is usually in a stronger financial position (in the common exclusion case) and could afford to run up unrecoverable costs beyond the cap. Once the cap was reached (at no fault of the claimant) the proceedings would become commercially unviable (on the basis that the sum is small and the cap is set at a commercially viable level) even where the claimant has a very strong case.

Equally an aggressive and wealthy claimant can ruin a defendant if a cap is applied notwithstanding a weak case. There would be satellite litigation about whether the cap should be raised and whose fault it was that it had been reached early.

(iii) Shareholders should litigate at their own risk; there are already numerous means of managing this sort of dispute and minimising costs through ADR and active case management

23. <u>Should the cap be related to the value of what the shareholders are arguing about rather than to the reasonable costs of litigating every issue?</u>

Yes = ; No =

Contrary to the robust view of those who supported the idea of a cap, the point was made that very often the value of what is being argued about is in dispute which makes it very difficult to set a cap be reference to value. Further, value is not necessarily an indication of value and minority shareholder disputes are often about control and similar matters that cannot easily be valued.

One response suggested that any cap should be fixed by reference to reasonable costs of litigating, not value, and another response suggested that setting a fixed financial limit in each case unrelated to value.

24. <u>What are the main cost centres in such disputes and can anything be done to reduce costs?</u>

The following costs centres were identified:

(i) Expert evidence over valuation of shares and related accountancy issues (most mentions).

(ii) Witnesses of fact.

(iii) Disclosure (when more than giving access to files).

(iii) A huge plethora of allegations (several mentions).

Suggestions for controlling costs were as follows:

(i) The court should attempt to determine all relevant issues before turning to experts who are often not needed at all. Further, prior to conclusion of the "liability" stage, experts reports usually misfire because neither side gives the right instructions. In practice there is relatively little between experts once the proper question has been identified. True expert opinion as opposed to forensic accounting is rarely deployed in a meaningful way. Limiting disclosure, length of pleadings, witness statements, length of trial, cross examination of witnesses and experts plus a vigorous assessment regime are likely to keep costs down in low value cases.

(ii) As a matter of course the court should order a split trail with the issue of unfair prejudice being determined before any valuation takes place.

(iii) One view was: perhaps greater use could be made of court appointed experts. However, the contrary view was: single joint experts will not work in this area; each side needs an expert to prepare submissions; savings could be made by limiting cross examination of experts to actual questions rather than putting submissions to the expert and asking for comments - judges familiar with the area ought to be able to step in and stop unnecessary cross examination

(iv) Compulsory mediation

(v) An issues-based approach to costs orders might help (as a deterrent against wide-ranging allegations)

25. **Should the Section 986(5) special rule as to costs continue to apply?**

All responses were in favour of continuing the special rule.

Comments included the following:

(i) Shareholders should not be discouraged from bringing such proceedings where they are being expropriated against their will. It is quite proper that such acquisitions are subject to the possibility of court scrutiny without a huge burden being placed on a small shareholder. To remove this provision would effectively remove the protection from a small shareholder altogether. The provision also acts as a discipline to bidders/companies to ensure that offers are made fairly and conducted fairly.

(ii) The court retains a discretion if the shareholder has acted unreasonably or if the application has been unnecessary, improper or vexatious.

(iii) The procedure recognizes that the minority shareholder is effectively subject to a compulsory acquisition and the protection is not absolute.

(iv) This rule has been discussed by the CA in Re Britoil PLC [1990] BCC 70. It operates in the context of a statutory expropriation regime and has some similarity with the way the costs discretion is exercised where opposition to a scheme of arrangement or reduction of capital is unsuccessful

25A. Part 26 Schemes of Arrangement and Part VII Transfers

The following comment was added by a specialist practitioner:

The practice of the court in relation to the costs of opposing Part 26 schemes of arrangement and Part VII transfers. Persons affected by the scheme of arrangement or business transfer, particularly members or creditors in the case of a scheme of arrangement and policyholders in the case of a transfer of insurance business are entitled to appear on the application for sanction; the evidence and submissions of opposing creditors or members may well assist the court in its scrutiny of the proposal even if the court is satisfied that sanction should be given. As a rule the court will not make costs orders against objecting members and creditors where their objections are not frivolous and have assisted the court; sometimes no order is made, sometimes an order is made in favour of the objecting party. See para 22-24 judgment of David Richards J. in Royal Sun Alliance v British Engine [2006] EWHC 2947 (Ch) It is essential that this practice is preserved. Creditors schemes in particular are becoming more and more aggressive and nothing should discourage scrutiny by the court of such proposals.

26. Should any changes be made to the cost rules in the Court of Protection?

The majority view was that no radical changes needed and the two general rules operate satisfactorily in most cases; the present rules are sensible and encourage applications to be made whereas changing the rules might discourage applicants;

Comments were as follows:

(i) It should be made clearer that the general rule in each type of case will not be departed from except in truly exceptional cases to prevent satellite costs litigation between families already at war.

(ii) The new Court of Protection Rules have led to significantly longer hearings and higher costs and, possibly, more appeals.

One response stated that the default rule should be brought in line with CPR i.e. costs should follow the event.

27. <u>Should the current costs exceptions for the declarations or discharge of restrictive covenants continue?</u>

Yes = 10; No = 5

One response in support was qualified: yes in relation to applications for modification (where the applicant will be trying to get out of his predecessors bargain).

Comments opposing the proposal included the following:

(i) This should be subject to the reasonableness test with an exception to the protection in the case of unreasonableness.

(ii) Not in relation to declarations (where one party by definition will have taken the wrong stance about the meaning of a covenant.

(iii) An improperly resisted application should have cost consequences.

One response commented: the normal costs regime applies to all court proceedings in leasehold enfranchisement cases while all cases in LVT and on appeal to the Lands Tribunal are subject to no costs regime; either costs should follow the event for all enfranchisement cases or for none of them.

28. <u>Do the provisions of rules 7.33 and 7.40 of the Insolvency Rules 1986 operate fairly and provide adequate costs protection in insolvency proceedings or should these rules be modified or extended in any way?</u>

Three responses were received:

- two responses said that the current rules operate fairly and do not require any change

- one response stated that Rule 7.40 should only apply if the court has expressly drawn the matter to the attention of the litigant

29. <u>Do the current rules and practices relating to costs of trustees in bankruptcy, liquidators, receivers and administrators, the official receiver etc operate fairly and provide adequate costs protection to both parties?</u>

Six responses were received.

Three expressed dissatisfaction:

(i) There is a perception that these officials milk each case e.g. attendances by more than one partner and several juniors.

(ii) Lawyers acting for trustees in bankruptcy charge excessive hourly rates; the courts and creditors have little opportunity to monitor these costs; the court should set much lower hourly rates.

(iii) Trustees in bankruptcy, liquidators, receivers and administrators, the official receiver do not always act reasonably; courts should be more willing to apply the costs follow the event rule so that office holders act with the same discipline as others. Costs orders made against these officials will not deter people acting as these office holders.

Three commented as follows:

(i) The current approach operates fairly well as long as orders for security are "full value".

(ii) The Practice Statement on the Fixing and Approval of the Remuneration of Appointees 2004 needs simplification and clarity.

(iii) The current approach operates satisfactorily.

30. <u>Should there be any special cost rules applying to administrations?</u>

Two responses were received both saying that there should not be any special rules applied to administrators.

31. **In "hostile" litigation the normal cost rules apply unless either or both parties obtain a Beddoe order; in "non-hostile" litigation the normal approach is that costs of both sides will come out of the pension fund even if no Beddoe order has been made: does this approach operate fairly or are changes required?**

The view of all was that the current approach operates fairly and requires no change.

32. **Trustees may be ordered to pay costs themselves if they are found to have behaved unreasonably or for their own benefit: does this operate fairly or are changes required?**

The strong majority view was that the current approach operates fairly and requires no change. Two responses were qualified as follows: there should be more general discretion rather than absolute rules and trustee behaviour ought to be looked at carefully to see if they have behaved reasonably.

33. **Are any special costs rules (in addition to those mentioned below) required for intellectual property claims or are the general costs provisions adequate and fair?**

The responses were as follows:

- the general provisions are fine
- no special rules are required

34. **Should the practice relating to amendments to particulars of objections before trial continue to apply?**

The responses were as follows:

- yes
- retain but clipped in the way of Earth Closet/See v Scott Paine orders.
- Yes, it is tried and tested

35. Does the approach to awarding indemnity costs where a claimant is required to prove matters unnecessarily, operate clearly and fairly?

The responses were as follows:

- it does not operate fairly as it is applied inconsistently

- it does not operate fairly as there is a degree of hindsight which can make the rule unfair – it is by no means always clear at the time of taking an action whether the matter was required to be proved unnecessarily.

- the approach referred to is rarely used; in general, in larger patent actions, the issues-based approach to making costs orders is reasonably fair in this area of work.

36. How best could costs be controlled in the Patents County Court?

Suggestions were as follows:

- by a strong judge
- Capping the costs by reference to the value of the patent
- by following Arnold J's proposal although there is a risk that front loading could become so extreme that cases become hugely expensive.

37. Do the defined and usual rules as to costs operate easily and fairly in revenue cases or are changes needed in any particular areas or types of case?

The rules operate fairly and do not need change

38. Is it right that arrangements by which HM Revenue and Customs waive their rights to costs are haphazard and, if so, how could matters be improved?

The arrangements are not haphazard and do not need changing.

39. Should cases which currently fall within the specialist list with a value of less than £25,000 be allocated to a new Chancery Fast Track in the County Court list?

There was about an equal split between those who thought the idea should be rejected and those who thought it might have possibilities. However, those who thought it might

have possibilities expressed firm qualifications: few chancery cases concern merely money and, where money is involved, it is rarely an indication of complexity; in many areas of chancery work, determining a money value is difficult e.g. renewals of leases and possession claims of business premises under the Landlord and Tenant Act 1954; and, at District Judge level there is a general lack of chancery expertise.

Accordingly, if such a change were to be made, there could be no automatic allocation - the decision should turn on complexity, not value, and whether the particular Court has proper chancery experience. In addition, there must be a discretion to multi-track any case at any stage on the grounds of complexity. Substantial dissatisfaction was expressed about the inadequacy of chancery experience at District Judge level in particular and it is perhaps unrealistic to think that this could be changed without a massive injection of funds into the legal system coupled with the appointment of many more (chancery experienced) judges across the Country. If these essential requirements were satisfied, a number of chancery cases could be tried on a Chancery Fast Track although it is doubtful that there are sufficient "straightforward" cases to warrant setting up a new procedural avenue. To allow for greater capture, the upper financial limit need not necessarily be confined to a maximum value of £25,000: a realistic upper limit might be £50,000. However, without specialist chancery judges, any such change is likely to be disastrous.

A more realistic approach (that nevertheless would require the appointment of many Chancery experienced judges) might be to introduce a Chancery Fast Track as District Registry level rather than at all County Courts. The legal system generally would benefit from having at least one District Judge in each District Registry with specialist chancery experience. However, even with a specialist Chancery District Registry District Judge, allocation must be based on complexity and not value.

40. Re Judges

See main body of response paper

41. Do you have any suggestions for reducing costs by changes to the following procedural steps:

The Chancery Bar Associations suggestions, based on responses to the questionnaire and discussion, are set out in the main body of this Response. Comments from individuals are set out below:

E-disclosure

- E-disclosure is very often too extensive resulting in many irrelevant documents – better filters are needed to ensure relevancy and a manageable number of documents.
- On heavier cases, encourage or require parties at early stage to agree a list of databases to be searched and the dates, search terms, document types; agree a joint forensic expert to provide both sides with the documents that should be disclosed

Disclosure generally

- Disclosure by list should be the exception, not the norm.
- Disclosure should be by providing copies of relevant documents.
- Encourage disclosure by providing access to files without need for a list.
- The practice of attaching key documents to pleadings has fallen away.
- Specific disclosure – no immediate or summary costs order either way: consider importance of what is revealed first.

Witness statements

- It is difficult to reduce time on witness statements as dealing with past events can be difficult.
- Allow counsel and solicitors to draft.
- Emphasise the direction that a witness statement should not merely recite documents.

Expert evidence

- Direct the form and structure of expert reports and require experts to meet before reporting.
- The normal direction should be for experts to hold discussions without prejudice and prepare a joint report before preparing individual reports so that expert reports focus on the issues not agreed.

- Experts lack court experience

Case management (the effect case management procedures have on costs and whether changes in process and/or procedure could bring about more proportionate cost)

- Case management also serves the purpose of parties meeting and discussing the case informally
- More case management at an early stage to focus parties on the relevant issues
- More directions should be dealt with on paper by requiring parties to justify their attendance; disallow costs if attendance cannot be justified.

ADR particularly mediation

- Norris J undertook some "neutral evaluations" when he was in Birmingham which were most effective and enabled the parties to reach agreement but not all cases will be suitable for this (or mediation)
- Most cases could benefit from mediation; lawyers need to be educated to realize that matters of law can be mediated. Mediation is best after disclosure at least and possibly witness statements – need to know the other side's case.
- Mediation can help but is better with a strong mediator. Mediation does however work best after disclosure and witness statements.
- By Rule costs of mediation should costs in the case.
- FDR can work well in the Family Division but judges require proper training. Some FDR is ineffective because the judge is not prepared to give proper indications.
- Extend mediation to all aspects of the case like disclosure, narrowing the issues as well as trying to settle the case overall.
- All cases can benefit from mediation which should come after AQ.
- ADR suffers where there is an inequality of arms and the more powerful side can be as unreasonable as it likes knowing that its unreasonableness will never come out.
- Stress with cost rules that mediation should take place pre-action or as early as possible;
- be flexible – in some cases ADR is cost effective and likely to work; in other cases the reverse is the case.

- ADR is overdone
- Compulsory ADR would just increase costs

General

Re: County Court listing

- The biggest single cause of wasted costs in the County Court is poor listing arrangements by court administration – very common to have a one day trial preceded by other applications which take up most of the morning resulting in the trial going off part heard; or five one hour applications all listed at 10.30 resulting in solicitors on hourly rates waiting for hours; or trials being adjourned at the last moment because a judge is not available.
- Block listing by court staff too often makes trial ineffective with the result that parties pay brief fees twice; there should be a right to obtain wasted costs from the MOJ where costs have been wasted because of errors by court staff.

Judicial preparation

- Judges need time to prepare for CMCs so as to give sound directions – they are overworked
- Involvement of the court does not assist as judges are not sufficiently well prepared to deal with issues such as disclosure.

Telephone hearings

- More telephone hearings

Disclosure & skeletons

- There should be a more sceptical approach to disclosure applications; the court should not penalise or criticise advocates for failing to raise a point in their skeletons as this has led to voluminous skeletons driven by fear that an argument not fully made in the skeleton will not be permitted or at least permitted without a further skeleton.

Cost estimates

- Cost capping and remodelling CPR 44.18; even if no cost capping, should have to provide more costs information at the CMC; production of costs estimates

should be compulsory at the CMC and should be reviewed by the Master/DJ; paragraph 6.5A of the Cost PD is too complicated in relation to inaccurate cost estimates and needs to be remodelled; costs should be capped at specific stages e.g. the cost of ws, and this should be the norm; lengthy ws inevitably increase costs; also unnecessary and contentious correspondence drives up costs

User friendly courts

- The perception shared with solicitors is that the present system is geared to making it easier for the court to dispose of matters whatever cost that might involve to the parties. In preliminary stages there is a tendency to list directions hearings and CMCs which are not required; more use should be made of standard directions with the onus on the parties to request a hearing if they cannot agree. Skeleton arguments are expected too often, even for small applications. Too much documentation is required to get even simple matters to trial – there should be more selectivity about what goes into skeleton arguments and trial bundles: skeletons should be skeletal and not full scale written submissions. Meditation is going the same way with lengthy position statements and large bundles which turn out to contain little relevant material; this is driven by fear of being called to account by judge or client if anything of the slightest marginal relevance is not before the court.

Substantive law reform needed

- In some areas, e.g. cohabitant's disputes over the family home, the law makes maters difficult: Stack v Dowden makes it necessary to inquire in detail into thoughts, words and deeds over a long period of time which makes it difficult to predicate the likely outcome making settlement difficult – law reform would save costs. The fact that there are three different types of prescription introduces unnecessary complexity into easement disputes.

Finally ……

- Two factors that may increase costs not mentioned in the Report are: (i) the machismo conduct of litigation by professional indemnity insurers or their solicitors (ii) the drip feed funding of legally aided parties which increases costs for other parties.

SCHEDUL IV

COURT OF PROTECTION COSTS

1. The incidence of costs in the Court of Protection are governed by section 55 of the Mental Capacity Act 2005 and rules 156 to 159 of the Court of Protection Rules 2007. Section 55(1) provides that subject to the Court's rules the costs of and incidental to all proceedings in the court are in its discretion. Rule 156 of the Court of Protection Rules provides that the general rule in property and affairs applications is that all parties are entitled to have their costs paid out of P's estate[8]. Rule 157 provides that in personal welfare cases the general rule is that there should be no order for costs. Rule 159 provides that the court may depart from these general rules where the circumstances justify and sets out certain matters which the court will have regard to such as the conduct of the parties.

1. These general rules reflect the different approaches taken by the old Court of Protection in relation to property and affairs applications under the Mental Health Act 1983 and the Family Division in relation to applications for declarations made under its "best interests" inherent jurisdiction.

2. The practice of the old Court of Protection to award all parties their costs out of P's estate can be traced back to the practice of the Masters in Lunacy in the 19th century and in particular to the decisions of the Court of Appeal in *Re Cathcart* [1892] 1 Ch 549 and [1893] 1 Ch 466 in relation on the exercise of the Court's discretion on costs under the Lunacy Act 1890. In the second decision at 472 Lord Halsbury stated:

   "It seems to me that if the demand for inquiry is really prompted by a desire to protect the person and property of the alleged lunatic, and is

[8] The Court of Protection Rules 2007 and the Mental Capacity Act 2005 use the shorthand "P" to denote a person who lacks capacity to make a particular decision.

presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall upon the person so invoking the aid of the law to protect those in need of protection."

3. This rule of practice was applied by the Court of Protection[9] for the next 117 years. Over that period, the jurisdiction of the court expanded. In 1925 it obtained statutory powers to settle the property of a patient. In 1970 it acquired jurisdiction to authorise the execution of a will on behalf of a person lacking capacity[10]. In 1986 with the introduction of enduring powers of attorney, it acquired jurisdiction to rule on disputes about the registration of such powers. The usual costs order (that all parties' costs were to be paid out of the patient's estate) was applied in all of these cases (at least at first instance) and in recent years was approved in a number of EPA cases (all unreported) by judges including Butler-Sloss P, Neuberger J and Hart J.

4. The final form of the old court's practice was summed up thus by Master Lush in a number of cases:

> "All legal costs incurred in relation to proceedings in the Court of Protection are at the discretion of the court, which may order them to be paid by the donor or charged on or paid out of his or her estate, or to be paid by an applicant, objector or any other person attending or taking part in the proceedings.
>
> The order most commonly made by the court is that the costs of the parties be subject to detailed assessment on the standard basis and paid from the donor's estate...
>
> However in cases where the court considers an objection or application to have been frivolous, malicious, vexatious or motivated by self interest,

[9] I use the term "Court of Protection" in this context to encompass its predecessors - the Masters in Lunacy and the poorly named Management and Administration Department (or "MAD").

[10] Section 17 of the Administration of Justice Act 1969 amending mental Health Act 1959.

the court has discretion to order that the costs of the proceedings be paid by the applicant or objector"

5. The Court of Protection Rules 2007 were put together by a committee (of which I was a member) under the chairmanship of Mr Justice Charles. The committee included the Master (now Senior Judge) of the Court of Protection, Denzil Lush other members of the judiciary, the Official Solicitor, various civil servants charged with implementing the Mental Capacity Act 2005 and a number of solicitors and barristers with experience of practice in the old Court of Protection and in the Family Division. Whilst it was the intention to put together a single procedural code for the new Court capable of dealing with all types of case, this was not quite achieved. In several instances the different approaches of the Court's predecessors were retained.

6. However the Court of Protection Rules 2007 have led to significant other changes in the way that cases are now heard. Prior to October 2007 cases were generally dealt with in a fairly robust and rapid manner. Most cases were heard by a Master. They were rarely listed for more than half a day and would generally be dealt with in that time. Although the old court's rules required affidavit evidence, they also permitted the court to act on oral and written statements generally even if these would not otherwise be admissible evidence. Thus in practice, evidence was often by letter. Cross-examination was unusual. Directions hearing were very rare, most applications were disposed of at the first listed hearing. This speedy approach to justice occasionally led to decisions which could be criticised as somewhat rough and ready. However it had one distinct advantage. It was cheap. This was particularly important where the patient was paying all of the costs.

7. The new Court's procedures are more like the CPR. There are directions hearings. Evidence is required to be by way of witness statement and at final hearings will be tested by cross-examination. Independent expert reports on questions of capacity are more common. And as a result the costs of

contentious cases has increased.

8. There are two situations in property and affairs disputes where large costs bills are particularly likely to arise. These are contested registration of enduring powers of attorney and applications for statutory wills. Both of these types of application have the possibility to become very contentious, and both carry the risk that the real element of contention is not really P's best interests, but ancillary disputes between the parties. Thus contested EPA cases can have a tendency to become an opportunity to vent long festering sibling disputes at P's expense. In a statutory will case a party can argue robustly for his own interests under P's will, again at P's expense. It is worth noting that neither of these types of case existed at the time that the old *Cathcart* rule of practice was first formulated.

9. I have been involved in a number of cases where very significant costs (several in excess of £100,000, and one in the region of £400,000) have been incurred. In some of these cases it has been argued that a party's conduct has been such that he should be deprived of some or all of his costs. In at least once case the court (having found the party to have lied in her evidence and to have procured a highly dubious will in her own favour) deprived a party of her costs.

10. However my general experience in a statutory will case is that provided a party does not act fraudulently or wholly improperly the court will apply the general presumption and order a party's costs to be paid out of P's estate even where the party has robustly and unsuccessfully sought to advance his own partisan interests.

11. My concern when the Court of Protection Rules were being drafted was that the practice of the old court should not be lost. There is definitely something to be said for the view that it is important that a party should not be deterred from bringing an application which is in P's best interests for fear of being penalised in costs. This is of particular importance to a professional deputy who has no

personal interest in the outcome of proceedings, but wishes to ensure that P's best interests are considered. I am aware that the Official Solicitor considers it very helpful that family members who are joined to statutory will proceedings (and who may have no prior knowledge of the case) are able to recover the costs of seeking legal advice.

12. However, I am concerned that the effect of elevating the old rule of practice into an official rule of court when coupled with the other changes in the court's procedures and the general increase in costs risks placing an undue burden on P's assets.

13. I would suggest that there should be consideration to modifying the existing rule. Whilst a professional deputy could expect to recover his costs for bringing a reasonable application from P's estate regardless of the outcome, I would suggest that parties seeking to argue a partisan stance should not necessarily recover their costs as well. Alternatively, there could be a cap on the costs recoverable. They could be entitled to the costs of responding to the application and filing a witness statement. However if they instruct counsel to argue the case on their behalf and they are unsuccessful, they might have to bear these costs. The detail would perhaps be best filled in by a practice direction.

David Rees, 5 Stone Buildings, Lincoln's Inn, July 2009